FILED
JAN 18 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 80-2070 and 81-24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-2070

SUMITOMO SHOJI AMERICA, INC.,

Petitioner,

—v.—

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Respondents.

No. 81-24

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Cross-Petitioners,

—v.—

SUMITOMO SHOJI AMERICA, INC.,

Cross-Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

(Attorneys listed inside front cover)

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NOTE

The following opinions, decisions and judgments of the courts below have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

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Relevant Docket Entries

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 5641 (CHT)

LISA M. AVIGLIANO, *et al.*,

Plaintiffs,

—against—

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

DATE	FILINGS—PROCEEDINGS
11-21-77	Filed complaint. Issued summons.
2-21-78	Filed deft's objections to pltffs' interrogatories.
2-21-78	Filed deft's answers to pltffs' interrogatories.
5-18-78	Filed deft's Notice of Motion for an order pur. to Rule 12(b)(6) dismissing the class action claims for failure to state a claim and for an order pur. to 12(b)(1), 12(b)(6) dismissing the complaint etc. ret - 6/23/78 at 10:00 in room 906.
6-19-78	Filed deft's First amended ANSWER and counterclaims.
6-06-79	Fld OPINION #48679 pltffs 1981 claims are denied & dfts section 796k counterclaim for atty's fees are dsmd. All other motion [sic] are denied TENNEY, J m/n

DATE	FILINGS—PROCEEDINGS
8-10-79	Filed Opinion #48964—defts question concerning the relationship of Title VII to the Treaty is hereby certified; all other applications are Denied. TENNEY, J. m/n
11-30-79	Filed OPINION # 49381 . . . Finally, the Court directs that its August 9, 1979 opinion and order be amended in the manner indicated herein. Tenney, J. m/n
3-10-80	Fld pltff's REPLY TO COUNTERCLAIMS of deft's.

Relevant Docket Entries

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Case No. 80-7418

SUMITOMO SHOJI AMERICA, INC.,
Defendant-Appellant,

—against—

LISA M. AVIGLIANO, *et al.*,
Plaintiffs-Appellees.

DATE	FILINGS—PROCEEDINGS
8-16-79	Movant Sumitomo Shoji America, Inc. motion for leave to appeal filed pfs. 3379
8-17-79	Order denying motion for leave to appeal pursuant to 28 USC § 1292(b) without reling the merits without prejudice to the motion's being renewed after Judge Tenney has had an opportunity to consider the Hicks affidavit (Exhibit I) filed.
12-10-79	Movant Sumitomo Shoji America, Inc. petition for leave to appeal filed, pfs. 1148.
1-24-80	Order denying movant Sumitomo Shoji America motion for leave to appeal filed.
2-20-80	Movant Sumitomo Shoji America, Inc. motion for rehearing with suggestion for en banc reconsideration filed 1865 [illegible]
5-19-80	Order granting motion for rehearing; further ordered *granting leave to appeal filed* (JLO, JON, EVG)

DATE	FILINGS—PROCEEDINGS
10-01-80	Appellant Sumitomo motion for reopening record on appeal, pfs. filed. Appellant Sumitomo motion for striking material submitted by EEOC pfs. filed.
10-03-80	Appellees Avigliano, et al. affidavit in opposition to motion for reopening record on appeal and for order striking material, pfs. filed.
10-06-80	Order that motion to reopen the record on appeal and to strike material submitted by the EEOC is set down for argument with the appeal on October 17, 1980 filed (JEL, WRM, TJM)
1-09-81	Case affirmed and remanded, published opinion, WRM
1-09-81	Judgment filed

Summons and Complaint Dated November 21, 1977

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

77 Civ. 5641

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER, ELIZABETH WONG,

Plaintiffs,

—v.—

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon LEWIS M. STEEL, ESQ., EISNER, LEVY, STEEL & BELLMAN, P.C., plaintiff's attorney, whose address 351 Broadway, New York, New York 10013 an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Illegible]
Clerk of Court.

[Illegible]
Deputy Clerk.

Dated: November 21, 1977

[Seal of Court]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civ. 5641

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER, ELIZABETH WONG, on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

—against—

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

COMPLAINT

CLASS ACTION

JURISDICTION

1. This case involves sex and national origin discrimination in employment. Jurisdiction of this Court is invoked pursuant to 28 U.S.C., §§ 1131, 1343, 2201, and 2202. This case arises under the Equal Employment Opportunity Act of 1964, 42 U.S.C., § 2000e, *et. seq.*, 42 U.S.C., § 1981, and the Thirteenth Amendment to the United States Constitution.

THE PARTIES

2. Plaintiffs, Avigliano, Chenicek, Cristofari, Cummins, Mandelbaum, Mannina, Meisels, Pacheco, Schneider, Silberstein, and Wong, are female citizens of the United States. They

reside in the State of New York, with the exception of Mandelbaum, who resides in the State of New Jersey.

3. Plaintiff Turner is a citizen of Japan, who resides in the State of New York.

4. Plaintiffs Avigliano, Cristofari, Pacheco, and Wong are presently employed by defendant at its 345 Park Avenue, New York, New York office.

5. Plaintiffs Mannina, Schneider and Turner are employees of the defendant presently on maternity leave.

6. Plaintiffs Chenicek, Cummins, Mandelbaum, Meisels, and Silberstein, are former employees of defendant, who left their employment with the defendant because of its discriminatory practices.

7. Defendant Sumitomo Shoji America, Inc. is a corporate entity doing business in the State of New York, and upon information and belief, incorporated under the laws of the State of New York. The defendant maintains a principal office at 345 Park Avenue, New York, New York 10022.

CLASS ACTION ALLEGATIONS

8. Plaintiffs bring this as a class action pursuant to 23(a) and (b) (2), of the Federal Rules of Civil Procedure, on their own behalf and on behalf of all women who have worked for the defendant, are working for the defendant, have left the employ of the defendant because of its discriminatory policies, or may seek employment with the defendant. The members of this class, or classes, are discriminated against in ways which deprive them or have deprived them of equal employment opportunities by reason of their sex, and/or nationality.

9. As to the class or classes described in paragraph 5 of the Complaint:

(1) The number of members in said class or classes is in the thousands and is, therefore, so numerous that joinder of all members is impracticable;

(2) There are questions of law and fact common to the class or classes, said common questions being whether the customs, practices and policies of defendant violate their Federal civil rights;

(3) The claims of the plaintiffs are typical of the class or classes;

(4) The plaintiffs will fairly and adequately protect the interest of the class or classes as they are women, and with the exception of plaintiff Turner, citizens of the United States desirous of obtaining equality for women and equality for United States citizens;

(5) The defendant has acted or failed to act on grounds applicable generally to the class or classes, thus making final relief appropriate with respect to the class or classes as a whole.

JURISDICTIONAL PREREQUISITES

10. Plaintiffs Avigliano, Cristofari, Cummins, Mandelbaum, Mannina, Meisels, Pacheco, Schneider, Silberstein, Turner, and Wong have filed timely and proper complaints before the Equal Employment Opportunity Commission, alleging denial by defendant of their rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C., § 2000e, *et. seq.*

11. On or about October 21, 1977, plaintiffs were advised that they were entitled to institute a civil action in the appropriate United States District Court within ninety (90) days of receipt of their notices of right to sue. A copy of said notices of right to sue is attached hereto and made a part hereof, and marked Exhibits A-1 to A-11.

FIRST CAUSE OF ACTION

12. Defendant has engaged in unlawful employment practices against plaintiffs and the class and/or classes they represent by:

(a) Discriminating against women by restricting them to clerical jobs;

(b) Discriminating against women by refusing to train them or promote them to executive, managerial, and/or sales positions.

SECOND CAUSE OF ACTION

13. Defendant has engaged in unlawful employment practices against plaintiffs Avigliano, Chenicek, Cristofari, Cummins, Mandelbaum, Mannina, Meisels, Pacheco, Schneider, Silberstein, Wong, and the class or classes they represent, by:

(a) Discriminating against plaintiffs on the basis of nationality by restricting them to clerical jobs;

(b) Discriminating against these plaintiffs on the basis of nationality by refusing to train them or promote them to executive, managerial, and/or sales positions.

THIRD CAUSE OF ACTION ON BEHALF OF ELIZABETH WONG

14. On or about December 7, 1977, the defendant increased the work load and responsibilities of plaintiff Wong and refused to give her additional pay or to promote her.

15. Plaintiff Wong alleges upon information and belief that defendant took this action in reprisal for the filing of her charge with the Equal Employment Opportunity Commission.

16. On or about September 28, 1977, plaintiff Wong filed an additional charge with the Equal Employment Opportunity Commission alleging that she was retaliated against for the filing of her initial charge.

17. Plaintiff Wong alleges upon information and belief, that the Equal Employment Opportunity Commission will no longer process her retaliation charge, after issuing her a right to sue letter with regard to her initial charge. Therefore, plaintiff Wong has exhausted all procedural requirements, and may properly allege retaliation in this complaint.

EQUITY

18. The plaintiffs and those they represent have no adequate or complete remedy at law to redress the wrongs alleged, and this suit for a permanent injunction is the only means of securing adequate relief. Plaintiffs and those they represent are now suffering and will continue to suffer irreparable injury from defendant's policies, practices and customs of discrimination in its employment practices unless this Court enjoins such policies, practices and customs.

WHEREFORE, plaintiffs respectfully request this Court:

(a) To assign this case for a hearing at the earliest possible date and cause the case to be expedited in every possible way;

(b) Issue a permanent injunction:

(1) Enjoining defendant from engaging in the aforesaid unlawful employment practices;

(2) Directing defendant to promote plaintiffs and the class or classes they represent to executive, managerial, and/or sales positions;

(3) Directing defendant to institute a training program to upgrade plaintiffs and the class or classes they represent and to take such affirmative steps as may be necessary to remedy the effects of defendant's discriminatory practices;

(4) Enjoining defendant from discriminating on the basis of sex and nationality in hiring new employees.

(c) Award plaintiffs and their class or classes:

(1) Compensatory and punitive damages for injuries suffered by plaintiffs and the class or classes they represent by reason of defendant's unlawful employment practices;

(2) The costs of this action together with reasonable attorneys fees.

(d) Grant plaintiffs and the class or classes they represent such other and further relief as may be necessary and proper.

Dated: New York, New York
November 21, 1977

EISNER, LEVY, STEEL & BELLMAN, P.C.
Attorneys for Plaintiffs
351 Broadway
New York, New York 10013
(212) 966-9620

By: /s/ LEWIS M. STEEL
Lewis M. Steel

Exhibit A-1

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:
Ms. Lisa M. Avagliano
c/o Lewis M. Steel, Esq.
351 Broadway
New York, New York 10013

FROM:
Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Room 1301
New York, New York 10007

CHARGE NUMBER:
021-77-1366

EEOC REPRESENTATIVE
Ralph Munoz, District Counsel

TELEPHONE NUMBER
264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

☐ More than 180 days have expired since the filing of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

☒ With the issuance of this Notice of Right to Sue the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e—5(f) (1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U.S. District Court in the form and manner it requires. *Your request to the U.S. District Court should be made well in advance of the 90-day period mentioned above.*

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

/s/ ARTHUR W. STERN
Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

Date: October 27, 1977

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

Exhibit A-2

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:
Ms. Rosemary T. Cristofari
c/o Lewis M. Steel, Esq.
351 Broadway
New York, New York 10013

FROM:
Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Room 1301
New York, New York 10007

CHARGE NUMBER:
021-77-1361

EEOC REPRESENTATIVE
Ralph Munoz, District Counsel

TELEPHONE NUMBER
264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

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On Behalf of the Commission

/s/ ARTHUR W. STERN
Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

Date: October 27, 1977

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

Exhibit A-3

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:
Ms. Catherine Cummins
c/o Lewis M. Steel, Esq.
351 Broadway
New York, New York 10013

FROM:
Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Room 1301
New York, New York 10007

CHARGE NUMBER:
021-77-1367

EEOC REPRESENTATIVE
Ralph Munoz, District Counsel

TELEPHONE NUMBER
264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

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An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

/s/ ARTHUR W. STERN
Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

Date: October 27, 1977

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

Exhibit A-4

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:
Ms. Raellen Mandelbaum
c/o Lewis M. Steel, Esq.
351 Broadway
New York, New York 10013

FROM:
Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Room 1301
New York, New York 10007

CHARGE NUMBER:
021-77-1362

EEOC REPRESENTATIVE
Ralph Munoz, District Counsel

TELEPHONE NUMBER
264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

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On Behalf of the Commission

/s/ ARTHUR W. STERN
Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

Date: October 27, 1977

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

Exhibit A-5

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:
Ms. Maria Mannina
c/o Lewis M. Steel, Esq.
351 Broadway
New York, New York 10013

FROM:
Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Room 1301
New York, New York 10007

CHARGE NUMBER:
021-77-1363

EEOC REPRESENTATIVE
Ralph Munoz, District Counsel

TELEPHONE NUMBER
264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

☐ More than 180 days have expired since the filing of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

☒ With the issuance of this Notice of Right to Sue the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e—5(f) (1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U.S. District Court in the form and manner it requires. *Your request to the U.S. District Court should be made well in advance of the 90-day period mentioned above.*

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

/s/ ARTHUR W. STERN
Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

Date: October 27, 1977

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

Exhibit A-6

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:
Ms. Sharon Meisels
c/o Lewis M. Steel, Esq.
351 Broadway
New York, New York 10013

FROM:
Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Room 1301
New York, New York 10007

CHARGE NUMBER:
021-77-1364

EEOC REPRESENTATIVE
Ralph Munoz, District Counsel

TELEPHONE NUMBER
264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

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☐ More than 180 days have expired since the filing of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

☒ With the issuance of this Notice of Right to Sue the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e—5(f) (1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U.S. District Court in the form and manner it requires. *Your request to the U.S. District Court should be made well in advance of the 90-day period mentioned above.*

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

/s/ ARTHUR W. STERN
Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

Date: October 27, 1977

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

Exhibit A-7

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:
Ms. Frances Pacheco
c/o Lewis M. Steel, Esq.
351 Broadway
New York, New York 10013

FROM:
Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Room 1301
New York, New York 10007

CHARGE NUMBER:
021-77-1744

EEOC REPRESENTATIVE
Ralph Munoz, District Counsel

TELEPHONE NUMBER
264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

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☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

☒ With the issuance of this Notice of Right to Sue the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e—5(f) (1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U.S. District Court in the form and manner it requires. *Your request to the U.S. District Court should be made well in advance of the 90-day period mentioned above.*

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

/s/ ARTHUR W. STERN
Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

Date: October 27, 1977

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

Exhibit A-8

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:
Ms. Joanne Schneider
c/o Lewis M. Steel, Esq.
351 Broadway
New York, New York 10013

FROM:
Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Room 1301
New York, New York 10007

CHARGE NUMBER:
021-77-0049

EEOC REPRESENTATIVE
Ralph Munoz, District Counsel

TELEPHONE NUMBER
264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

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☐ It has been determined that the Commission will continue to process your charge.

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You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

/s/ ARTHUR W. STERN
Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

Date: October 27, 1977

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

Exhibit A-9

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:
Ms. Janice Silberstein
c/o Lewis M. Steel, Esq.
351 Broadway
New York, New York 10013

FROM:
Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Room 1301
New York, New York 10007

CHARGE NUMBER:
021-77-1360

EEOC REPRESENTATIVE
Ralph Munoz, District Counsel

TELEPHONE NUMBER
264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

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You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

/s/ ARTHUR W. STERN
Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

Date: October 27, 1977

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

Exhibit A-10

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:
Ms. Reiko Turner
c/o Lewis M. Steel, Esq.
351 Broadway
New York, New York 10013

FROM:
Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Room 1301
New York, New York 10007

CHARGE NUMBER:
021-77-1670

EEOC REPRESENTATIVE
Ralph Munoz, District Counsel

TELEPHONE NUMBER
264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

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On Behalf of the Commission

/s/ ARTHUR W. STERN
Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

Date: October 27, 1977

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

Exhibit A-11

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:
Ms. Elizabeth Wong
c/o Lewis M. Steel, Esq.
351 Broadway
New York, New York 10013

FROM:
Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Room 1301
New York, New York 10007

CHARGE NUMBER:
021-77-1365

EEOC REPRESENTATIVE
Ralph Munoz, District Counsel

TELEPHONE NUMBER
264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

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☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

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You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

/s/ ARTHUR W. STERN
Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

Date: October 27, 1977

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

Defendant's Answers to Plaintiffs' Interrogatories Sworn to February 3, 1978

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

76 Civ. 5641 (CHT) [sic]

LISA M. AVIGLIANO, *et al.*,

Plaintiffs,

—against—

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

DEFENDANT'S ANSWERS TO PLAINTIFFS' INTERROGATORIES

Defendant Sumitomo Shoji America, Inc. (hereinafter "Sumitomo") hereby answers "Plaintiffs' First Interrogatories and Request for Production of Documents" as follows:

INTERROGATORY

1. In what state of the United States is the Corporation incorporated?

ANSWER

1. New York.

INTERROGATORY

2. State whether the Corporation is a subsidiary of any other corporation. If so, state the name of the parent and state the location of the parent's principal offices.

ANSWER

2. Sumitomo is a wholly-owned subsidiary of Sumitomo Shoji Kaisha, Ltd., a Japanese corporation which maintains its principal place of business at 15, Kitahama 5-Chome, Higashi-Ku, Osaka, Japan, and 2-2 Hitosubashi 1-Chome, Chiyoda Ku, Tokyo, Japan.

INTERROGATORY

3. State where the Corporation maintains its principal office, giving the full address.

ANSWER

3. 345 Park Avenue, New York, New York 10022.

INTERROGATORY

4. (As amended by December 29, 1977 letter of counsel for plaintiffs to counsel for defendant): State where the corporation maintains other offices, listing the full address of each office.

(a) As to each office, state whether the personnel practices in effect are substantially the same as the personnel practices in effect in the Corporation's principal office.

(b) As to each office where the personnel policies are not substantially the same as the policies in effect at the principal office, please state in detail how the policies differ from the principal office in respect to methods of hiring, promotion, testing, transfer, requirements for any job title, or other distinctions relating to the question of qualifications to fill similar job titles or perform similar work as may exist at the principal offices.

(c) State whether any employee of the Corporation has general authority over personnel practices in all of the offices of the Corporation. If the answer to the question is in the affirmative, please state the name, title, and address of said employee, and set forth the scope of his authority over the personnel practices in all offices. If the answer is in the negative, state who has the general supervisory authority over the personnel offices in each of the Corporation's offices, and state whether said employee or employees report to anyone at the principal office, or any other office and, if so, to whom, listing addresses for all employees and titles mentioned in this answer.

ANSWER

4. 350 Fifth Avenue, Room 7100
New York, New York 10001

John Hancock Center,
Suite 3818
875 North Michigan Avenue
Chicago, Illinois 60611

26500 Northwestern Highway
Suite 406
Southfield, Michigan 48076

1100 Milam Building,
Suite 3434
Houston, Texas 77022

Room 315, Cotton Exchange
Building
Dallas, Texas 75201

One California St., Suite 630
San Francisco, California
94111

900 Fourth Ave., Suite 3101
Seattle, Washington 98164

3108 First National
Bank Tower
1300 S.W. Fifth Avenue
Portland, Oregon 97201

1014 City National
Bank Bldg.
606 South Olive Street
Los Angeles, Calif. 90014

Room 3929, United States
Steel Building
600 Grant Street
Pittsburgh, Pennsylvania
15219

(a) No.

(b) Each branch office, except the office at 350 Fifth Avenue, New York, New York has autonomous control over salary, hiring, promotion, testing, transfer and requirements for job titles of certain employees including secretaries, clerks, office business machine operators, maintenance personnel, guards, chauffeurs, messengers, receptionists, telex machine operators, etc. Such policies differ according to standards set by the branches, labor conditions and standards in the areas where the branches are located, customs and policies in the areas where the branches are located, and the requirements of each of the branches.

(c) No. Insofar as the employees described in subparagraph (b) hereof are concerned, personnel practices of the branches, except the office at 350 Fifth Avenue, New York, New York, are under general supervisory authority of the general managers of each such branch, who do not report on such matters except on an informational basis to Sumitomo's principal office (addresses for each of such general managers are furnished above). In New York, insofar as the employees described in subparagraph (b) hereof are concerned, personnel practices of both the offices at 345 Park Avenue and at 350 Fifth Avenue are under the general supervisory authority of Mr. H. Tsuwano, Personnel Manager, 345 Park Avenue, New York, New York 10022.

INTERROGATORY

5. State the total number of employees employed by the Corporation.

ANSWER

5. 464 (approximately, as at December 1, 1977).

INTERROGATORY

6. State the total number of employees employed by the Corporation at each of its offices.

ANSWER

6. New York, New York (345 Park Avenue)	209
New York, New York (350 Fifth Avenue)	21
Pittsburgh, Pennsylvania	2
Chicago, Illinois	73
Detroit, Michigan	2
Houston, Texas	36
Dallas, Texas	6
San Francisco, California	44
Seattle, Washington	11
Portland, Oregon	12
Los Angeles, California	48
	464

INTERROGATORY

7. Does the Corporation use job titles? If the answer is yes, list all job titles which have been utilized by the Corporation since April 1, 1969, and state as to each job title when it came into being, and until what date the job title was utilized.

ANSWER

Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer this Interrogatory with information as of December 1, 1977 without prejudice to Sumitomo's right to object to furnishing an answer to this Interrogatory for any period of time prior to December 1, 1977. Sumitomo does not object to answering this Interrogatory for the period December 1, 1974 through December 1, 1977 but objects to furnishing information for any period prior thereto (see Sumitomo's Objections to Plaintiffs' Interrogatories, hereinafter "Sumitomo's Objections", served and filed herewith). With respect to the period December 1, 1974 through December 1, 1977, Sumitomo's answer is as follows:

7. Yes. General Manager, assistant general manager, department manager, sub-branch manager, manager, assistant manager, assistant to general manager, administrator, supervisor,

senior clerk, senior secretary, clerk, secretary, business machine operator, maintenance, salesperson, guard, chauffeur, messenger, receptionist, telex machine operator. Not all such titles are formally assigned and other designations may be used from time to time. All such titles were used prior to December 1, 1974 and all are still utilized except supervisor, use of which was discontinued September 1, 1977.

INTERROGATORY

8. Does the Corporation use job descriptions? If the answer is yes, identify all job descriptions which have been in use since April 1, 1969, and annex copies of all documents containing job descriptions which have been utilized at any time by the Corporation since April 1, 1969 to date, specifying the periods when said descriptions have been utilized.

ANSWER

8. No.

INTERROGATORY

9. If the Corporation has utilized job descriptions which have not been reduced to writing, please list each job by title, stating next to each job what the description of the job is, and state when the Corporation has employed persons to fill such job from April 1, 1969 until the present.

ANSWER

9. Not applicable.

INTERROGATORY

10. Does the Corporation classify employees into categories such as executive, managerial, professional, technical, clerical, etc.? If the answer is in the affirmative, identify all documents which describe how the classification is accomplished, and attach copies to these answers. Also list all job titles which fall within each category.

ANSWER

10. Yes. Sumitomo maintains no documents which describe how such classification is accomplished. Job titles are not formally tied to employee classification nor do job titles in all cases fall exclusively within one employee classification. The following list relates job titles, informal or otherwise, to employee classification only to the extent that such job titles usually do fall within employee classification:

Employee Classification	*Job Title Usually Within Classification*
Executive	General Manager, Assistant General Manager and Department Manager (if made executives)
Managerial and Supervisory	General Manager, Assistant General Manager, Department Manager, Sub-branch Manager, Manager, Assistant Manager, Assistant to General Manager, Administrator, Senior Clerk, Senior Secretary
Others	Clerk, Secretary, Business Machine Operator, Maintenance, Salesperson, Guard, Chauffeur, Messenger, Receptionist, Telex Machine Operator.

INTERROGATORY

11. If the Corporation orally classifies employees, and/or refers to employees as executive, managerial, professional, technical, clerical, etc., please list all such categories utilized and list all job titles which fall within each category.

ANSWER

11. See answer to Interrogatory 10, above.

INTERROGATORY

12. As of the last day of the pay period closest to December 1, 1977, give:

(a) the number of female employees at each of the Corporation's offices, further broken down to give:

1. the number of female employees at each office by category, such as executive, managerial, professional, clerical, etc.;

2. the number of female employees at each office, by job title.

(b) the number of employees whose country of national origin is not Japan at each of the Corporation's offices, further broken down to give:

1. the number of employees whose country of national origin is not Japan at each office by category, such as executive, managerial, professional, clerical, etc.;

2. the number of employees whose country of national origin is not Japan at each office by job title.

ANSWER

12.

(a) Sumitomo has no objection to furnishing plaintiffs with the number of female employees at each of Sumitomo's offices. As to the balance of the information requested by Interrogatory 12(a), see Sumitomo's Objections served and filed herewith.

Office	*Number of Female Employees at Office*
New York (345 Park Avenue)	80
New York (350 Fifth Avenue)	16
Pittsburgh	1

Chicago	28
Detroit	1
Houston	14
Dallas	2
San Francisco	23
Seattle	4
Portland	6
Los Angeles	24

(b) Sumitomo does not maintain information as to "national origin" of its employees.

INTERROGATORY

13. Does the Corporation utilize any selection criteria by which it determines, or which aids in the determination of whom it will hire for jobs, or promote? If the answer to this question is in the affirmative, please answer the following additional questions.

(a) Has the criteria which is or has been utilized in writing? If so, identify all documents containing such criteria from April 1, 1969 to date, and attach copies of all such documents to the responses to these interrogatories.

(b) If the criteria utilized has not been reduced to writing, list what the criteria is for each job title and/or classification utilized by the Corporation since April 1, 1969 to date in descending order of importance, specifying for what period the criteria has been in effect and state whether the criteria has changed from time to time, and, if so, list the appropriate changes for the relevant time periods.

ANSWER

13. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

14. Does the Corporation utilize career paths and/or progression ladders as methods of determining eligibility for promotion? If the answer to this interrogatory is yes, please answer the following questions:

(a) Does the Corporation have any documents which identify career paths or progression ladders? If so, identify all such documents from April 1, 1969 to date, and attach copies to the answers to these interrogatories.

(b) If the Corporation utilizes career paths and/or progression ladders which are oral, please set forth any such career path or progression ladders which have been utilized from April 1, 1969 to date, specifying the period in which each career path and/or progression ladder was utilized.

ANSWER

14. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

15. Does the Corporation have a table of organization, or other chart or document(s) which sets forth the Corporation's supervisory chain of command? If such a document or documents exist, identify all such documents from April 1, 1969 to date, and attach copies to the answers to these interrogatories. If a table of organization exists which has not been reduced to writing, please set it forth in this answer.

ANSWER

15. Yes. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer this Interrogatory with information as of December 1, 1977 without prejudice to Sumitomo's right to object to furnishing an answer to this Interrogatory for any period of time prior to December 1, 1977. Sumitomo does

not object to answering this Interrogatory for the period December 1, 1974 through December 1, 1977 but objects to furnishing such information for any period prior thereto (see Sumitomo's Objections served and filed herewith). With respect to Sumitomo's documents reflecting its supervisory chain of command as of December 1, 1977, see Exhibit "1" hereto.*

INTERROGATORY

16. Has the Corporation since April 1, 1969 to date, utilized an employee's country of national origin, for example, Japanese citizenship, as a criterion for eligibility to hold certain jobs with the Corporation? If the answer to this interrogatory is yes, please answer the following questions:

(a) For which jobs has this criterion been utilized, and state the time period of utilization from April 1, 1969 to date.

(b) For any of the jobs listed in answer to subsection (a) above, is the criterion mandatory? If so, state for which jobs the criterion is mandatory, and over what time periods from April 1, 1969 to date.

ANSWER

16. No.

INTERROGATORY

17. Has the Corporation utilized sex as a criterion for eligibility for any job with the Corporation from April 1, 1969 to date? If the answer to this question is yes, please answer the following questions:

(a) For which jobs has this criterion been utilized, and state the time period of utilization from April 1, 1969 to date.

(b) For any of the jobs listed in answer to subsection (a) above, is the criterion mandatory? If so, state for which jobs

* Information for the period commencing, December 1, 1974 will be furnished at a later date to be mutually agreed upon by counsel.

the criterion is mandatory, and over what time periods from April 1, 1969 to date.

ANSWER

17. No.

INTERROGATORY

18. Has the Corporation filed with the Equal Employment Opportunity Commission Standard Form 100, known as the Employer Information Report EEO-1? If the answer is yes, please state for what years since 1969 this form has been filed, and attach a copy of the form filed for each year through the present year.

ANSWER

18. Yes. Sumitomo does not object to furnishing the information requested by this Interrogatory for its New York City offices for the years 1975, 1976 (and 1977 when available) but objects to furnishing such information for any period prior thereto, and for any of its offices other than New York (see Sumitomo's Objections served and filed herewith). For Employer Information Report EEO-1 for Sumitomo's New York City offices for the years 1975 and 1976, see Exhibit "2" hereto.

INTERROGATORY

19. Does the Corporation maintain any documents reflecting the composition of its employees, containing break downs of number of employees by sex, race, and/or country of national origin? If the answer to this question is yes, specify for what years since April 1, 1969 such documents have been kept, identify each document, and annex a copy of each document to the answers to these interrogatories.

ANSWER

19. No.

INTERROGATORY

20. List the name, age, address, sex, country of national origin, and school years completed by each employee who is presently employed by the Corporation, and with respect to each such employee state:

(a) the office in which each employee is employed;

(b) all job titles held since date of initial employment, including present job title;

(c) the date of each job title change;

(d) salary received during the 12 month period from December 1, 1976 through November 30, 1977;

(e) the date of initial employment.

ANSWER

20. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

21. List the name, age, address, school years completed of each woman hired by the Corporation who has left the employ of the Corporation since October 8, 1973, and with respect to each such former employee state:

(a) the date of initial employment;

(b) all job titles held since date of initial employment;

(c) date of each job title change.

ANSWER

21. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

22. List the name, ages, address, school years completed of each person whose country of national origin is not Japan hired by the Corporation who has left the employ of the

Corporation since October 8, 1973, and with respect to each such former employee, state:

(a) the date of initial employment;

(b) all job titles held since date of initial employment;

(c) date of each job title change.

ANSWER

22. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

23. State whether the Corporation has maintained a personnel manual or any document containing personnel policies since April 1, 1969 to date. If the answer is yes, identify the manual or manuals, and/or documents stating dates in which each has been in use by the Corporation and attach copies to the answers to these interrogatories.

ANSWER

23. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

24. State whether the Corporation has any documents setting forth employee pay rates and/or benefits, or which set forth opportunities for employee advancement, or materials which in any way explain career opportunities with the Corporation. If the answer is yes, identify all such documents from April 1, 1969 to date, and attach copies to the answers to these interrogatories.

ANSWER

24. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

25. List the name, address, sex, country of national origin, title, and office where employed of all employees from April 1, 1969 to date who have held, or continue to hold, supervisory positions. With respect to each such employee, state:

(a) Date of initial employment;

(b) All job titles held since date of initial employment, including present job title.

(c) If not presently employed by the Corporation, the date the employee left the Corporation.

(d) Date of each hob [sic] title changed.

(e) Describe the unit, department, section, or other component of the Corporation which the employee supervises, or supervised prior to leaving the Corporation.

(f) The number of employees under the supervision of the supervisor at present, or when the supervisor left the employment of the Corporation.

ANSWER

25. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

26. List the name, age, address, sex, country of national origin, and school years completed by each present employee of the Corporation, or former employee of the Corporation who worked with the Corporation during the period April 1, 1969 to date, who functions or functioned in a sales or selling capacity. With respect to each such employee, state:

(a) date of intitial employment;

(b) all job titles held since date of initial employment, including present job title;

(c) date of each hob [sic] title change;

(d) salary, including all commission payments, etc.

ANSWER

26. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

27. Does the Corporation have any written criteria it utilizes to determine eligibility for hire, transfer or promotion to sales or selling jobs? If the answer is yes, identify each document which contains such criteria and attach copies to the answers to these interrogatories.

ANSWER

27. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

28. If the Corporation does not have written criteria with regard to eligibility for sales or selling jobs, does the Corporation have oral criteria? If the answer is yes, list all criteria utilized in order of importance, stating which, if any, of the criteria utilized are mandatory.

ANSWER

28. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

29. State whether the Corporation has any standard procedure by which an employee may seek a promotion, or by which the Corporation grants promotions on its own initiative. If the answer to this interrogatory is in the affirmative, please answer the following questions:

(a) Is the procedure in writing? If the answer to this question is in the affirmative, please answer the following:

(i) identify the document or documents and attach copies to the answers to these interrogatories;

(ii) by whom were the procedures promulgated?

(iii) how were they communicated to the employees?

(iv) to employees in which job titles were the procedures communicated, and when were they communicated?

ANSWER

29. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

30. Does the Corporation have oral, rather than written standard procedures for promotion? If the answer is yes, answer the following additional questions:

(a) By whom are the oral procedures promulgated?

(b) How are they communicated?

(c) To which employees, and when?

(d) State in detail what the procedures are.

ANSWER

30. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

31. Does the Corporation have oral, rather than written procedures by which employees may becomes salespersons? If the answer is yes, answer the following questions:

(a) By whom are the oral procedures promulgated?

(b) How are they communicated?

(c) To what employees and when?

(d) State in detail what the procedures are.

ANSWER

31. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

32. Has the Corporation utilized any tests from April 1, 1969 to date for the purpose of selecting applicants for employment in, or promotion or transfer to, any job. If the answer to this question is yes, answer the following questions.

(a) Identify all such tests and attach copies to the answers to these interrogatories, and state when each test was used.

(b) As to each test, unless the test is attached to the answers, describe in detail the nature of the test and the questions asked.

(c) As to each test, describe the criteria which the Corporation applied, including the passing grade, etc.

(d) As to each test, state who judged or judges the test results, and/or made or makes determinations as a result thereof.

ANSWER

32. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

33. State whether the Corporation has had, or presently has a training or education program which employees may utilize

to seek promotions or transfers. If so, describe in detail, including the dates of initiation and termination; what employees are eligible for inclusion; how the existence of the program was communicated to employees; and, the numbers of employees who enrolled, year by year, from April 1, 1969 to date, indicating sex and country of national origin during each program. Also state as to each such program whether the Corporation actually ran the program, and if not, who did. Also list the address where each program was conducted.

ANSWER

33. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

34. State whether the Corporation utilizes any system of written evaluations or efficiency reports regarding the quality and quantity of work performed by employees. If so, answer the following:

(a) Identify all such documents, stating during what period of time from April 1, 1969 to date each report was utilized, and attach blank copies of each form utilized.

(b) For each evaluation utilized, state which categories of employees by job title were, or are, evaluated.

(c) For each category of employee by job title evaluated, state how often they are evaluated, listing the date of the last evaluation.

ANSWER

34. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

35. Does the Corporation maintain personnel files for individual employees? If the answer is in the affirmative, answer the following:

(a) Are the files maintained on all employees. If not, list the job titles for which such files are maintained.

(b) Identify all standard documents contained in such employee personnel file, stating during what period of time from April 1, 1969 to date, each document was utilized, and attach blank copies of each form utilized. If different types of files are maintained for different categories of employees, or for employees with different job titles, answer this question category by category, and/or job title by job title.

ANSWER

35. Yes.

(a) Yes.

(b) See Sumitomo's Objections served and filed herewith.

INTERROGATORY

36. Has the Corporation ever been charged with discrimination on the basis of sex and/or national origin in any other court, or before any public agency, federal, state or local, in any jurisdiction of the United States? If the answer is in the affirmative, list each case name individually, setting forth the forum, the case identification number, and the status of each case.

ANSWER

36. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

37. With regard to each question above which requires the Corporation to set forth information which is not based on documents, please give the source of information, stating the name and address of the informant(s).

ANSWER

37. Mr. M. Tsuge, Manager
Bunker Section
Petroleum Products Department
Sumitomo Shoji Kaisha, Ltd.
24-1, Kandanishikicho
3-chome, Chiyoda-ku
Tokyo, Japan

Mr. H. Nakagawa, Manager, Legal
Department
Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

INTERROGATORY

38. Identify separately and with particularity sufficient for use as a description in a subpoena each document (not already identified in the answers to the foregoing interrogatories or produced in response to the requests contained herein) which contains any of the information given in answer to each of the foregoing interrogatories.

ANSWER

38. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

39. State whether the Corporation asserts that either sex and/or country of national origin is a *bona fide* occupational qualification (hereinafter "b.f.o.q.") for holding of any job

with the Corporation. If the answer is in the affirmative, list all job titles and/or categories in which the Corporation asserts a b.f.o.q. defense; listing for each job title or job category what defense is asserted, and stating in detail the basis for the assertion of the defense.

ANSWER

39. No.

Dated: New York, New York
February 3, 1978

/s/ H. NAKAGAWA
H. Nakagawa

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

H. Nakagawa, being duly sworn, deposes and says that deponent is Manager, Legal Department of Sumitomo Shoji America, Inc., defendant in the within action, that he has read the foregoing answers to plaintiffs' first interrogatories and request for production of documents and knows the contents thereof, and that the same is true to deponent's own knowledge except as to matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

/s/ H. NAKAGAWA
H. Nakagawa

Sworn to before me this
3rd day of February, 1978

/s/ PAMELA ROTH
Notary Public

PAMELA ROTH
Notary Public, State of New York
No. 41-4622400
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1979

Exhibit 1

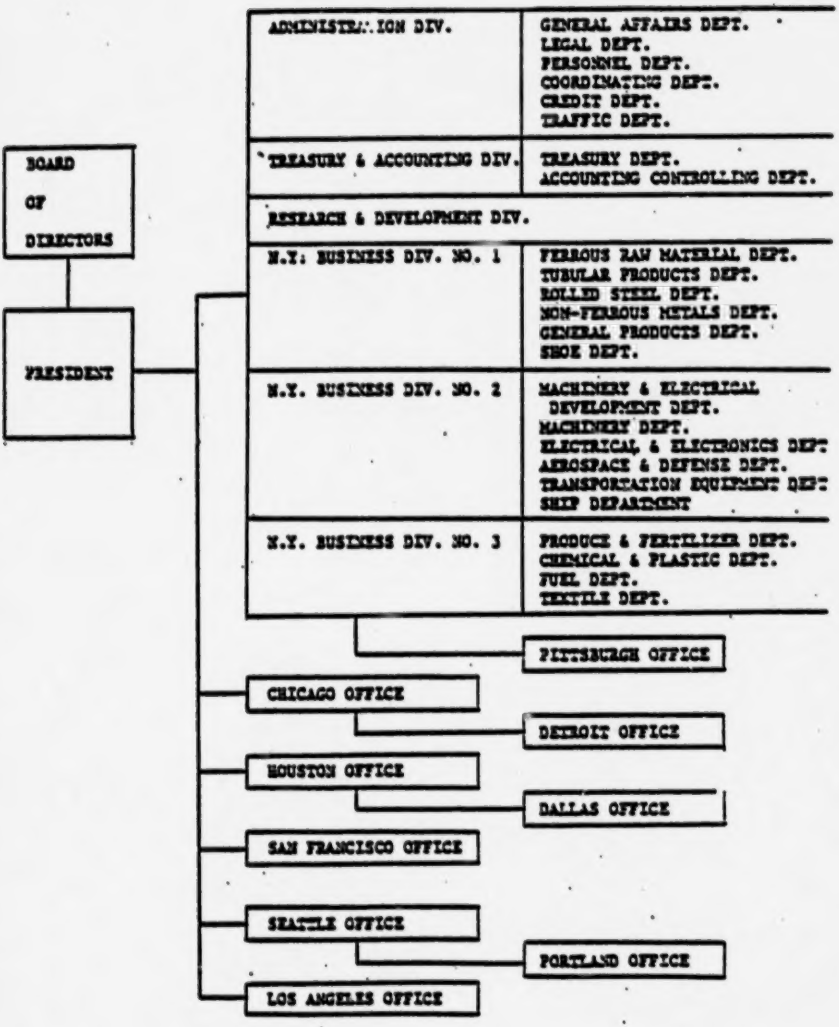
BOARD OF DIRECTORS
PRESIDENT
ADMINISTRATION DIV.
GENERAL AFFAIRS DEPT.
LEGAL DEPT.
PERSONNEL DEPT.
COORDINATING DEPT.
CREDIT DEPT.
TRAFFIC DEPT.
TREASURY & ACCOUNTING DIV.
TREASURY DEPT.
ACCOUNTING CONTROLLING DEPT.
RESEARCH & DEVELOPMENT DIV.
N.Y. BUSINESS DIV. NO. 1
FERROUS RAW MATERIAL DEPT.
TUBULAR PRODUCTS DEPT.
ROLLED STEEL DEPT.
NON-FERROUS METALS DEPT.
GENERAL PRODUCTS DEPT.
SHOE DEPT.
N.Y. BUSINESS DIV. NO. 2
MACHINERY & ELECTRICAL DEVELOPMENT DEPT.
MACHINERY DEPT.
ELECTRICAL & ELECTRONICS DEPT
AEROSPACE & DEFENSE DEPT.
TRANSPORTATION EQUIPMENT DEPT
SHIP DEPARTMENT
N.Y. BUSINESS DIV. NO. 3
PRODUCE & FERTILIZER DEPT.
CHEMICAL & PLASTIC DEPT.
FUEL DEPT.
TEXTILE DEPT.
PITTSBURGH OFFICE
CHICAGO OFFICE
DETROIT OFFICE
HOUSTON OFFICE
DALLAS OFFICE
SAN FRANCISCO OFFICE
SEATTLE OFFICE
PORTLAND OFFICE
LOS ANGELES OFFICE

Exhibit 2

EQUAL EMPLOYMENT OPPORTUNITY EMPLOYER INFORMATION REPORT EEO-1

[stamp bearing year 1975]

[Comment: 3 columns of two sets of numbers illegible]

[illegible words]

- Equal Employment Opportunity Commission
- Office of Federal Contract Compliance

SUMITOMO SHOJI AMERICA, INC.
345 PARK AVENUE
NEW YORK, N.Y. 10022

P 9-0024400 MC 07471P

2 of 3 COMPANY UNITS

PLEASE USE THIS FORM FOR HEADQUARTERS REPORT.

58a

Section A—TYPE OF REPORT

Refer to instructions for number and types of reports to be filed.

1. Indicate by marking in the appropriate box the type of reporting unit for which this copy of the form is submitted(MARK ONLY ONE BOX).

(1) ☐ Single-establishment Employer Report

Multi-establishment Employer:

(2) ☐ Consolidated Report
(3) ☒ Headquarters Unit Report
(4) ☐ Individual Establishment Report (submit one for each establishment with 25 or more employees)
(5) ☐ Special Report

2. Total number of reports being filed by this Company (Answer on Consolidated Report only) _____

Section B—COMPANY IDENTIFICATION *(To be answered by all employers)*

OFFICE USE ONLY

1. Name of Company which owns or controls the establishment for which this report is filed (if same as label, skip to item 2, this section)

a.

Address (Number and street)	City or town	County	State	ZIP code	b.

b. Employer Identification No.

2. Establishment for which this report is filed.

a. Name of establishment SUMITOMO SHOJI AMERICA, INC.

c.

Address (Number and street)	City or town	County	State	ZIP code	d.
345 Park Avenue	New York		N.Y.	10022	

b. Employer Identification No. (if same as label, skip.)

3. Parent of affiliated company (Multi-establishment Employers: Answer on Consolidated Report only)

a. Name of parent or affiliated company | b. Employer Identification No.

Address (Number and street)	City or town	County	State	ZIP code

Section C—EMPLOYERS WHO ARE REQUIRED TO FILE *(To be answered by all employers)*

[x] Yes	[ ] No	1. Does the entire company have at least 100 employees in the payroll period for which you are reporting?
[x] Yes	[ ] No	2. Is your company affiliated through common ownership and/or centralized management with other entities in an enterprise with a total employment of 100 or more?

NOTE: If the answer is NO to BOTH questions, skip to Section G; otherwise complete ENTIRE form.

[ ] Yes	[x] No	3. Does the company or any of its establishments (a) have a prime contract with any agency of the Federal Government, a Federally-assisted construction contract, or a subcontract at any tier under any prime Government contract, amounting to more than $10,000; or (b) serve as a depository of Federal Government funds; or (c) serve as an issuing and paying agent of U.S. Savings Bonds and Notes; or (d) hold a Federal Government bill of lading in any amount?

Job Categories (See Appendix (4) for definitions)	TOTAL EMPLOYEES IN ESTABLISHMENT			MINORITY GROUP EMPLOYEES (See Appendix (5) for definitions)							
				MALE				FEMALE			
	Total Employees Including Minorities (1)	Total Male Including Minorities (2)	Total Female Including Minorities (3)	Negro (4)	Oriental (5)	American Indian* (6)	Spanish Surnamed American (7)	Negro (8)	Oriental (9)	American Indian* (10)	Spanish Surnamed American (11)
Officials and managers	30	30			27						
Professionals	29	29			24						
Technicians	1	1			1						
Sales workers	44	44			40						
Office and clerical	100	25	75		5			2	11		8
Craftsmen (Skilled)											
Operatives (Semi-skilled)	1	1									
Laborers (Unskilled)											
Service workers											
TOTAL →	205	130	75		97			2	11		8
Total employment reported in previous EEO-1 report	173	104	69		79			1	10		7

(The trainees below should also be included in the figures for the appropriate occupational categories above)

		(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
Formal On-the-job trainees	White collar											
	Production											

*In Alaska include Eskimos and Aleuts with American Indians

[Comment: directions on top of second page of form illegible]

1. NOTE: On consolidated report, skip questions 2-5 and Section E.
2. How was information as to race or ethnic group in Section D obtained?
   1 [X] Visual Survey 3 [ ] Other—Specify .....
   2 [X] Employment Record
3. Dates of payroll period used—
   4/1—4/30/75
4. Pay period of last report submitted for this establishment
   3/1—3/31/74
5. Does this establishment employ apprentices?
   This year? 1 [ ] Yes 2 [X] No
   Last year? 1 [ ] Yes 2 [X] No

Section E—ESTABLISHMENT INFORMATION

1. Is the location of the establishment the same as that reported last year?
   1 [X] Yes 2 [ ] No 3 [ ] Did not report last year 4 [ ] Reported on combined basis

2. Is the major business activity at this establishment the same as that reported last year?
   1 [X] Yes 2 [ ] No 3 [ ] No report last year 4 [ ] Reported on combined basis

OFFICE USE ONLY

3. What is the major activity of this establishment? (Be specific, i.e., manufacturing steel castings, retail grocer, wholesale plumbing supplies, title insurance, etc. Include the specific type of product or type of service provided, as well as the principal business or industrial activity.

Import & Export

e.

Section F—REMARKS

Use this item to give any identification data appearing on last report which differs from that given above, explain major changes in composition or reporting units, and other pertinent information.

62a

Section G—CERTIFICATION (See instructions G)

Check one

1. ☐ All reports are accurate and were prepared in accordance with the instructions (check on consolidated only).
2. ☒ This report is accurate and was prepared in accordance with the instructions.

Name of Authorized Official	Title	Signature	Date
Shigehiro Kumamoto	Executive Vice President		5/29/75

Name of person to contact regarding this report (Type or print)	Address (Number and street)				
Allan Roberts					
Title	**City and State**	**ZIP code**	**Telephone Area Code**	**Number**	**Extension**
Ass't Mgr—Personnel	New York, N.Y.	10022	212	935-7000	

All reports and information obtained from individual reports will be kept confidential as required by Section 709 (e) of Title VII
WILLFULLY FALSE STATEMENTS ON THIS REPORT ARE PUNISHABLE BY LAW, U.S. CODE TITLE 18, SECTION 1001

Exhibit 2

EQUAL EMPLOYMENT OPPORTUNITY EMPLOYER INFORMATION REPORT EEO-1

[illegible words]

- Equal Employment Opportunity Commission
- Office of Federal Contract Compliance

1976 USE THIS FORM FOR YOUR HEADQUARTERS REPORT

S1302700 3 S = 3 SIC = 509

CO = 6102315 U = 6102315 EI = 135612163 6

SUMITOMO SHOJI AMERICA, INC. P 9-0024400 MC 07471P
345 PARK AVENUE
NEW YORK, N.Y. 10022 1 91236440

64a

Section A—TYPE OF REPORT

Refer to instructions for number and types of reports to be filed.

1. Indicate by marking in the appropriate box the type of reporting unit for which this copy of the form is submitted (MARK ONLY ONE BOX).

(1) ☐ Single-establishment Employer Report

Multi-establishment Employer:

(2) ☐ Consolidated Report
(3) ☒ Headquarters Unit Report
(4) ☐ Individual Establishment Report (submit one for each establishment with 25 or more employees)
(5) ☐ Special Report

2. Total number of reports being filed by this Company (Answer on Consolidated Report only) _____

Section B—COMPANY IDENTIFICATION *(To be answered by all employers)*

OFFICE USE ONLY

1. Name of Company which owns or controls the establishment for which this report is filed (if same as label, skip to item 2, this section)

a.

Address (Number and street)	City or town	County	State	ZIP code	b.

b. Employer Identification No.

2. Establishment for which this report is filed.

a. Name of establishment SUMITOMO SHOJI AMERICA, INC.

c.

Address (Number and street)	City or town	County	State	ZIP code	d.
345 Park Avenue	New York		N.Y.	10022	

b. Employer Identification No. (if same as label, skip.)

3. Parent of affiliated company (Multi-establishment Employers: Answer on Consolidated Report only)

a. Name of parent or affiliated company

b. Employer Identification No.

Address (Number and street)	City or town	County	State	ZIP code

65a

Section C—EMPLOYERS WHO ARE REQUIRED TO FILE *(To be answered by all employers)*

[x] Yes	[ ] No	1. Does the entire company have at least 100 employees in the payroll period for which you are reporting?
[x] Yes	[ ] No	2. Is your company affiliated through common ownership and/or centralized management with other entities in an enterprise with a total employment of 100 or more?
[ ] Yes	[x] No	3. Does the company or any of its establishments (a) have 50 or more employees *AND* (b) is not exempt as provided by 41 CFR 60-1.5, *AND* either (1) is a prime government contractor or first-tier subcontractor, and has a contract, subcontract, or purchase order amounting to $50,000 or more, or (2) serves as a depository of Government funds in any amount or is a financial institution which is an issuing and paying agent for U.S. Savings Bonds and Savings Notes?

NOTE: If the answer is yes to ANY of these questions, complete the entire form; otherwise skip to Section G.

[page 2]

Job Categories (See Appendix (5) for definitions)	TOTAL EMPLOYEES IN ESTABLISHMENT: Total Employees Including Minorities (1)	Total Male Including Minorities (2)	Total Female Including Minorities (3)	MINORITY GROUP EMPLOYEES (See Appendix (4) for definitions): MALE: Negro (4)	Oriental (5)	American Indian* (6)	Spanish Surnamed American (7)	FEMALE: Negro (8)	Oriental (9)	American Indian* (10)	Spanish Surnamed American (11)
Officials and managers	31	31			28						
Professionals	35	35			25						
Technicians	5	3	2								1
Sales workers	43	43			37						
Office and clerical	103	16	87		4		1	2	12		9
Craftsmen (Skilled)											
Operatives (Semi-skilled)	2	2									
Laborers (Unskilled)											
Service workers											
TOTAL →	219	130	89		94		1	2	12		10
Total employment reported in previous EEO-1 report	205	130	75		97			2	11		8

(The trainees below should also be included in the figures for the appropriate occupational categories above)

		(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
Formal On-the-job trainees	White collar											
	Production											

*In Alaska include Eskimos and Aleuts with American Indians

[Comment: directions on top of second page of form illegible]

1. NOTE: On consolidated report, skip questions 2-5 and Section E.
2. How was information as to race or ethnic group in Section D obtained?
   1 [X] Visual Survey
   2 [X] Employment Record
   3 [ ] Other—Specify .....
3. Dates of payroll period used—
   3/1—31/76
4. Pay period of last report submitted for this establishment
   4/1—30/75
5. Does this establishment employ apprentices?
   This year? 1 [ ] Yes 2 [X] No
   Last year? 1 [ ] Yes 2 [X] No

Section E—ESTABLISHMENT INFORMATION

1. Is the location of the establishment the same as that reported last year?
   1 [X] Yes 2 [ ] No 3 [ ] Did not report last year 4 [ ] Reported on combined basis

2. Is the major business activity at this establishment the same as that reported last year?
   1 [X] Yes 2 [ ] No 3 [ ] No report last year 4 [ ] Reported on combined basis

OFFICE USE ONLY

3. What is the major activity of this establishment? (Be specific, i.e., manufacturing steel castings, retail grocer, wholesale plumbing supplies, title insurance, etc. Include the specific type of product or type of service provided, as well as the principal business or industrial activity.

   Import & Export

e.

Section F—REMARKS

Use this item to give any identification data appearing on last report which differs from that given above, explain major changes in composition or reporting units, and other pertinent information.

Section G—CERTIFICATION (See instructions G)

Check one

1. ☐ All reports are accurate and were prepared in accordance with the instructions (check on consolidated only).
2. ☒ This report is accurate and was prepared in accordance with the instructions.

Name of Certifying Official	Title	Signature	Date
S. Kumamoto	Executive Vice President		6/30/76

Name of person to contact regarding this report (Type or print)	Address (Number and street)				
Allan Roberts	345 Park Avenue				
Title	**City and State**	**ZIP code**	**Telephone Area Code**	**Number**	**Extension**
Ass't Personnel Mgr.	New York, N.Y.	10022	212	935-7000	

All reports and information obtained from individual reports will be kept confidential as required by Section 709 (e) of Title VII
WILLFULLY FALSE STATEMENTS ON THIS REPORT ARE PUNISHABLE BY LAW, U.S. CODE TITLE 18, SECTION 1001

Defendant's Notice of Motion for an Order Dismissing the Complaint Pursuant to Rule 12(b)(1) and 12(b)(6) Dated May 18, 1978

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

77 Civ. 5641 (CHT)

LISA M. AVIGLIANO, et al.,

Plaintiffs,

—against—

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

NOTICE OF MOTION

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of J. Portis Hicks, sworn to May 18, 1978, the Memorandum of Law submitted herewith, and all prior proceedings heretofore had herein, defendant Sumitomo Shoji America, Inc. will move this Court before the Hon. Charles H. Tenney in Room 906, United States Courthouse, Foley Square, New York, New York, at 10:00 A.M. on June 23, 1978 or as soon thereafter as counsel can be heard, for an order pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure dismissing the class action claims of the complaint on the ground that plaintiffs fail to state a claim upon which relief can be granted, and for an order pursuant to Rules 12(b) (1) and 12(b) (6) of the Federal Rules of Civil Procedure dismissing so much of the complaint as purports to assert a claim pursuant to 28 U.S.C. §§ 2201 and 2202 or the Thirteenth Amendment to the United States

Constitution on the ground that such claims fail to invoke the subject matter jurisdiction of this Court and also fail to state a claim upon which relief can be granted.

Dated: New York, New York
May 18, 1978

Yours, etc.

WENDER, MURASE & WHITE
by /s/ J. PORTIS HICKS
(A Member of the Firm)
Attorneys for Defendant Sumitomo Shoji America, Inc.
400 Park Avenue
New York, New York 10022
(212) 832-3333

To: EISNER, LEVY, STEEL & BELLMAN, P.C.
Attorneys for Plaintiffs
351 Broadway
New York, New York 10013

Affidavit of J. Portis Hicks in Support of Motion Sworn to May 18, 1978

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

77 Civ. 5641 (CHT)

LISA M. AVIGLIANO, et al.,

Plaintiffs,

—against—

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

AFFIDAVIT

State of New York,
County of New York, *ss.:*

J. PORTIS HICKS, being duly sworn, deposes and says:

1. I am a member of the firm of Wender, Murase & White, attorneys herein for Sumitomo Shoji America, Inc. ("Sumitomo"), defendant in this action. I am fully familiar with the facts of this matter, and make this affidavit in support of defendant's motion for an order dismissing the class action claims of the complaint herein on the ground that plaintiffs fail to state claims upon which relief can be granted pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*), or pursuant to 42 U.S.C. § 1981. Defendant also moves pursuant to Rule 12(b) (1) and 12(b) (6) of the Federal Rules of Civil Procedure for an order dismissing so much of the complaint as purports to assert a claim for declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202 (the Federal Declara-

tory Judgment Act), or pursuant to the Thirteenth Amendment to the United States Constitution, on the ground that such claims fail to invoke the subject matter jurisdiction of this Court, and also fail to state claims upon which relief can be granted.

2. In the main, this motion speaks to the fundamental issue of whether Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*), and 42 U.S.C. § 1981, must yield to treaty rights of freedom of choice of employment assured by the Treaty of Friendship, Commerce and Navigation of 1953 between the United States and Japan (4 U.S.T. 2063, T.I.A.S. 2863, hereinafter the "Treaty").

3. Plaintiffs in this action claim that defendant Sumitomo has discriminated against them by reason of their sex (all are females) and by reason of their national origin (all claim to be U.S. citizens, except plaintiff Turner, who claims she is a "citizen" of Japan), and thus violated Title VII of the Civil Rights Act of 1964 as well as 42 U.S.C. § 1981. Plaintiffs claim they have been restricted to clerical jobs and not trained for, or promoted to, "executive, managerial and/or sales positions" (complaint, paras. 12 and 13). In addition, plaintiff Wong asserts an individual claim to the effect that Sumitomo refused to give her additional pay, or promote her, in retaliation for her having filed charges against Sumitomo with the United States Equal Employment Opportunity Commission ("E.E.O.C.").

4. Plaintiffs also purport to assert claims in this litigation pursuant to 28 U.S.C. §§ 2201 and 2202 (the Federal Declaratory Judgment Act), and the Thirteenth Amendment to the United States Constitution. Insofar as their purported claim under the Thirteenth Amendment is concerned, plaintiffs have agreed to "withdraw" such claim, but refuse to agree that such claim will be discontinued with prejudice. According to counsel for plaintiffs, this is because at a later date, the law might change and plaintiffs would then want to reassert their pur-

ported claim of enslavement. Such argument is sheer nonsense. It amounts to nothing more than an assertion of a "right" by plaintiffs to subject Sumitomo to any inappropriate, insufficent or wholly frivolous charge on the theory that should the law change, such claim might later have some basis. Plaintiffs' cavalier attitude, which has caused Sumitomo cost and expense in preparation of its motion relating to the purported Thirteenth Amendment claim, should not be countenanced by this Court. Defendant Sumitomo should be awarded its attorneys' fees for that part of its present motion.

5. Sumitomo is incorporated in New York and operates its business as a wholly-owned subsidiary of Sumitomo Shoji Kaisha, Ltd. ("SSK"), a Japanese corporation.

6. For purposes of Sumitomo's operations in the United States, pursuant to applicable law including the Immigration and Nationality Act and rules and regulations promulgated thereunder, many qualified Japanese nationals have been, and still are, assigned to Sumitomo by its parent company as "treaty trader" personnel to serve in executive and other supervisory, specialist and professional positions.

7. I am informed by Sumitomo and believe that each and every one of the plaintiffs herein originally applied to Sumitomo for employment in secretarial positions (not for employment in the "executive, managerial and/or sales positions" they now purport to seek), and that each and every one of the plaintiffs herein was in fact originally hired by Sumitomo as a secretary.

8. It is well known fact that Japan has few national resources upon which it can rely for production or consumption. Reference to any number of standard works on the subject verifies that since that is the case, Japan depends on foreign trade for survival, and has particularly seen the growth of the institution known as the "trading company" more than any

other nation. See e.g., Ballon, *Japan's Market and Foreign Business*, 217-27 (1971); 3 *The Japan Interpreter*, Vol. 8, 353-73 (Autumn, 1973). Trading companies engage primarily in the purchase and resale of goods, and carry on their activities for the most part in import and export markets.

9. Sumitomo is an integrated trading company or "*sogo-shosha*", a uniquely Japanese institution. While there are thousands of trading companies in Japan, there are fewer than a dozen integrated trading companies or *sogo shoshas*. The latter group accounts for more than 50% of Japanese imports and exports. *See* Ballon and *The Japan Interpreter*, both cited above.

10. About 90% of the business of the major *sogo shosha* involves import and export trade concluded with Japan, i.e., imports from or exports to that country. Thus, it is imperative that the managers, executives and "traders" (a more appropriate term than "salesperson" for the functions performed by those who buy and sell goods for a *sogo shosha*) comprehend sophisticated questions of international finance, international investment, international trade, shipping and related business matters, as well as local and foreign potential market conditions for a wide variety of products—chemicals, fertilizers, steel products, machinery, industrial plants, textiles, airplane parts, rubber, raw materials, energy, ceramics, etc. It is equally imperative that such persons, whether working for the parent corporation or for its branches, representative offices or subsidiaries, intimately comprehend the Japanese marketplace and Japanese business practices, culture and language. Ballon, *supra; The Japanese Interpreter, supra.*

11. For the reasons set forth in Sumitomo's Brief submitted herewith, defendant Sumitomo respectfully requests that this Court dismiss the complaint herein.

/s/ J. PORTIS HICKS
J. Portis Hicks

Sworn to before me this
day of May, 1978

CONNIE STAVROS
Notary Public

CONNIE STAVROS
Notary Public, State of New York
No. 31-4611726
Qualified in New York County
Commission Expires March 30, 19[illegible]

Plaintiffs' Notice of Motion to Dismiss Counterclaim Pursuant to Rule 12(b) Dated May 18, 1978

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 5641 (CHT)

LISA M. AVIGLIANO, et al.,

Plaintiffs,

—against—

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

NOTICE OF MOTION

S I R S :

PLEASE TAKE NOTICE that, upon the complaint and answer and counterclaim, the plaintiffs will move before the Honorable Charles H. Tenney on June 23, 1978 at 9:30 A.M., or as soon thereafter as counsel may be heard, at the United States Courthouse, Foley Square, New York, New York, to dismiss the counterclaim for failure to state a claim upon which relief may be granted and for lack of jurisdiction, pursuant to Rule 12(b), Federal Rules of Civil Procedure.

Dated: New York, New York
May 8, 1978

Yours, etc.,

EISNER, LEVY, STEEL & BELLMAN, P.C.
Attorneys for Plaintiffs
351 Broadway
New York, N.Y. 10013
(212) 966-9620

By: /s/ LEWIS M. STEEL
Lewis M. Steel

To: WENDER, MURASE & WHITE
400 Park Avenue
New York, New York 10022

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Attention: John Schmelzer, Esq.
Appellate Section
2401 E Street, N.W.
Washington, D.C. 20506

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing motion to dismiss defendant's counterclaim and memorandum in support were forwarded this 5th day of May, 1978, via first class mail, postage prepaid, to the following:

WENDER, MURASE & WHITE
400 Park Avenue
New York, New York 10022

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Attention: John Schmelzer, Esq.
Appellate Section
2401 E Street, N.W.
Washington, D.C. 20506

/s/ LEWIS M. STEEL
Lewis M. Steel

First Amended Answer and Counterclaims of Defendant
Filed June 19, 1978

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

77 Civ. 5641 (CHT)

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER, ELIZABETH WONG,

On Behalf of Themselves And All Others Similarly Situated,

Plaintiffs,

—against—

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

FIRST AMENDED ANSWER AND COUNTERCLAIMS

Sumitomo Shoji America, Inc. ("Sumitomo"), by its attorneys, Wender, Murase & White, for its Answer to the Complaint, alleges as follows:

I

RESPONSES TO PLAINTIFFS' PLEADINGS

1. Except as hereinafter expressly admitted or denied, Sumitomo denies knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the Complaint.

2. Admits so much of paragraph 1 of the Complaint as alleges that plaintiffs purport to bring this action pursuant to the statutes and other provisions of law referred to therein, and denies any violation of said statutes or provisions of law.

3. Admits so much of Paragraph 2 of the Complaint as alleges that the persons named therein are females.

4. Admits the allegations of Paragraphs 4 and 5 of the Complaint.

5. Admits so much of Paragraph 6 of the Complaint as alleges that the five persons named therein are former employees of Sumitomo, and denies the remaining allegations of said paragraph 6.

6. Admits the allegations of Paragraph 7 of the Complaint.

7. Admits so much of Paragraph 8 of the Complaint as alleges that plaintiffs purport to bring this action as a class action, and denies the remaining allegations of said Paragraph 8.

8. Denies the allegations of Paragraph 9 of the Complaint.

9. Denies the allegations of Paragraphs 12 through 18, inclusive, of the Complaint.

10. Denies that plaintiffs are entitled to the relief prayed for or any part thereof.

II

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

11. The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

12. This Court lacks jurisdiction over the subject matter of this action.

THIRD AFFIRMATIVE DEFENSE

13. Sumitomo's employment practices are proper and permissible and are sanctioned and privileged pursuant to the Treaty of Friendship, Commerce & Navigation between the United States and Japan, and applicable statutes, rules, regulations and practices.

FOURTH AFFIRMATIVE DEFENSE

14. Sumitomo's employment practices are proper, permissible and justified because they are founded upon and exist pursuant to bona fide occupational qualifications and business necessity.

FIFTH AFFIRMATIVE DEFENSE

15. All or portions of the plaintiffs' claims are barred by applicable statutes of limitations and unclean hands.

SIXTH AFFIRMATIVE DEFENSE

16. Plaintiffs lack standing to assert the claims made in the Complaint.

SEVENTH AFFIRMATIVE DEFENSE

17. The statutes and other provisions of law pursuant to which plaintiffs purport to bring this action do not provide the relief demanded in the Complaint.

AMENDED COUNTERCLAIMS

18. Jurisdiction of the within counterclaims is invoked pursuant to 28 U.S.C. §§ 1331 and 1343 and the doctrine of ancillary jurisdiction.

19. Upon information and belief, plaintiffs, on a date or dates unknown to defendant Sumitomo but prior to commencing certain proceedings referred to hereinafter, entered into a conspiracy to coerce Sumitomo to accede to plaintiffs' demands for assignment to work for which they were not quali-

fied, and for payment of additional compensation to which they were not entitled, and to retaliate against Sumitomo for its refusal to make such assignments or pay such additional compensation, by harassing Sumitomo and by injuring Sumitomo in its business and trade.

20. Upon information and belief, as part of carrying out their conspiracy, plaintiffs in bad faith, vexatiously, willfully and wrongfully commenced spurious and frivolous administrative proceedings before the Division of Human Rights of the Executive Department of the State of New York (the "Division of Human Rights"), and before the United States Equal Employment Opportunity Commission (the "EEOC"), making baseless claims in such proceedings that Sumitomo had discriminated against them. In the course of such proceedings, Sumitomo was subjected to interference with its person and property by the purported issuance against it by the EEOC of administrative subpoenae which were, upon information and belief, issued by the EEOC in violation of its own rules and regulations at the instance of and with the cooperation of plaintiffs, and as a result of which Sumitomo was required to spend substantial amounts of time and money responding thereto.

21. Both the proceedings before the Division of Human Rights and before the EEOC were terminated by such agencies with no action being taken and with no finding by either agency of reasonable or probable cause for the making of such claims by plaintiffs.

22. Upon information and belief, during the pendency of both of the aforesaid administrative proceedings plaintiffs interfered therewith for the purpose of preventing such proceedings from coming to determinations on the merits because plaintiffs were aware that such determinations would likely be adverse to them, and because in any event plaintiffs' purpose in bringing such proceedings was not to obtain a determination on the merits but instead was to coerce Sumitomo to accede to their demands for assignment to work for which they were not

qualified and for payment of additional compensation to which they were not entitled.

23. Upon information and belief, in furtherance of carrying out such conspiracy, plaintiffs also commenced the within action. The within action, upon information and belief, is brought by plaintiffs in bad faith and vexatiously, and is willfully and wrongfully brought for the purpose of coercing Sumitomo into acceding to plaintiffs' improper and unjustified demands concerning work assignments and additional compensation and in retaliation for Sumitomo's refusal to accede to such demands.

24. Upon information and belief, plaintiffs, also as part of and in furtherance of their wrongful conspiracy, have engaged in various other wrongful acts to disrupt the business of Sumitomo and injure it in its person and property, including by failing to perform their work properly, by engaging in acts of insubordination, by making divers misrepresentations about Sumitomo, by making attempts to induce other employees to breach their fiduciary duties to Sumitomo, by making efforts to purloin confidential documents and business records of Sumitomo, by coercing female employees not to accept promotions from Sumitomo during the pendency of this litigation, and by harassing and treating openly with scorn and contempt those employees who refused to accede to plaintiff's wrongful efforts thus to injure Sumitomo, all to the detriment and injury of Sumitomo.

25. As a result of the foregoing, defendant Sumitomo has been injured in its person and property and has accrued attorneys' fees and other costs. Further, by reason of plaintiffs' maintenance of the wrongful proceedings heretofore described, and this litigation, defendant Sumitomo has been injured in that it has been required to retain as employees one or more of the plaintiffs herein notwithstanding the fact that good and sufficient cause for their discharge exists, and has been required to give raises and other remuneration to one or more plaintiffs in excess of that to which they were properly entitled,

for fear that were Sumitomo to do otherwise it would be subject to charges of wrongful retaliation, notwithstanding the fact that any such action by Sumitomo should have been justified, proper and not retaliatory.

26. As a result of the foregoing, Sumitomo has sustained the following damages to date:

a) Attorneys' fees: $125,000

b) Retention of plaintiffs: $65,000

c) Lost personnel time and other incidental and/or consequential damages: $40,000

AS AND FOR A FIRST COUNTERCLAIM

27. Paragraphs 18 through 26 hereof are hereby incorporated by reference and repeated as though realleged in full.

28. Plaintiffs have instituted in bad faith, vexatiously willfully and wrongfully a spurious and frivolous Title VII action against defendant Sumitomo, knowing full well that such action has no basis in fact or law.

29. As a result of plaintiffs' wrongful conduct in commencing such spurious and frivolous Title VII action, defendant Sumitomo, pursuant to 42 U.S.C. § 2000(e)(5), is entitled to its attorneys' fees herein, and claims recovery against plaintiffs of attorneys' fees in the amount of $125,000 expended to date; and because plaintiffs' actions were willful and malicious, further prays punitive damages in the amount of $250,000.

AS AND FOR A SECOND COUNTERCLAIM

30. Paragraphs 18 through 26 and 28 and 29 hereof are hereby incorporated by reference and repeated as though realleged in full.

31. Plaintiffs have instituted in bad faith, vexatiously, willfully and wrongfully a spurious and frivolous federal administrative proceeding and a spurious and frivolous federal civil action against defendant Sumitomo, knowing full well that

such proceeding and action had, and have, no basis in fact or law, for the purpose of coercing and harassing Sumitomo.

32. Plaintiffs have tortiously abused the federal administrative and judicial process.

33. As the result of the foregoing, defendant Sumitomo has been injured and claims $230,000 in damages to date, and because plaintiffs' actions were willful and malicious, further prays punitive damages in the amount of $250,000.

AS AND FOR A THIRD COUNTERCLAIM

34. Paragraphs 18 through 26, 28 and 29 and 31 and 32 hereof are hereby incorporated by reference and repeated as though realleged in full.

35. Plaintiffs have instituted in bad faith, vexatiously, willfully and wrongfully spurious and frivolous federal and state administrative proceedings and a spurious and frivolous federal civil action against defendant Sumitomo, knowing full well that such proceedings and action had, and have, no basis in fact or law for the purpose of coercing and harassing Sumitomo.

36. Plaintiffs have deliberately and intentionally abused process under New York State Law.

37. As the result of the foregoing, defendant Sumitomo has been injured and claims $230,000 in damages to date, and because plaintiffs' actions were willful and malicious, further prays punitive damages in the amount of $250,000.

AS AND FOR A FOURTH COUNTERCLAIM

38. Paragraphs 18 through 26, 28 and 29, 31 and 32 and 35, 36 and 37 hereof are hereby incorporated by reference and repeated as though realleged in full.

39. Plaintiffs have instituted in bad faith, vexatiously, willfully and wrongfully spurious and frivolous federal and state administrative proceedings and a spurious and frivolous fed-

eral civil action against defendant Sumitomo, knowing full well that such proceedings and action had, and have, no basis in fact or law, for the purpose of coercing and harassing Sumitomo and have acted otherwise to disrupt and injure the business and trade of Sumitomo.

40. Plaintiffs have deliberately and intentionally inflicted temporal economic harm upon defendant Sumitomo without privilege or justification.

41. As the result of the foregoing, Sumitomo has been injured and claims $230,000 in damages to date, and because plaintiffs' actions were willful and malicious, further prays punitive damages in the amount of $250,000.

WHEREFORE, defendant-counterclaimant Sumitomo Shoji America, Inc., prays judgment as follows:

(1) That the complaint herein be dismissed with prejudice;

(2) That it be awarded judgment on its first counterclaim in the amount of $125,000 actual damages, plus $250,000 in punitive damages, jointly and severally against each of the plaintiffs named herein;

(3) That it be awarded judgment on its second counterclaim in the amount of $230,000 actual damages, plus $250,000 in punitive damages, jointly and severally against each of the plaintiffs named herein;

(4) That it be awarded judgment on its third counterclaim in the amount of $230,000 actual damages, plus $250,000 in punitive damages, jointly and severally against each of the plaintiffs named herein;

(5) That it be awarded judgment on its fourth counterclaim in the amount of $230,000 actual damages, plus $250,000 in punitive damages, jointly and severally against each of the plaintiffs named herein;

(6) That it be awarded the costs of this action, including reasonable attorney's fees; and

(7) That it be awarded such other and further relief as to this Court may seem just and proper.

WENDER, MURASE & WHITE

By /s/ J. PORTIS HICKS

(A Member of the Firm)
Attorneys for Defendant
Sumitomo Shoji America, Inc.
400 Park Avenue
New York, New York 10022
Tel: (212) 832-3333

Copy of Incoming Telegram, U.S. Embassy, Montevideo, Uruguay, to U.S. Department of State Dated November 8, 1949

DEPARTMENT OF STATE
INCOMING TELEGRAM

CONFIDENTIAL
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ACTION COPY

DIVISION OF
COMMUNICATIONS AND RECORDS
TELEGRAPH BRANCH

Control 3472

Rec'd November 8, 1949]
8:41 p.m.

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FROM: Montevideo

TO: Secretary of State

NO: 385, November 8, 5 p.m. [Comment: "389" is typed, but crossed out and "385 is handwritten]

Foreign Minister has incorporated suggestion re modification FCN treaty (EMBTEL 374, October 28) in revised draft, which Embassy has seen and which is to be presented for discussion tomorrow. In general, Foreign Minister's suggestions less drastic than anticipated. Foreign Minister reportedly after consulting President and Administration-sponsored Presidential candidate, desires deletion Article III re military service and limitation of rights under Article XVII—3 and 4 of MFN. Elsewhere, concerning granting of both nationality and MFN rights, Foreign Minister wishes exclude least favorable. Itemization other specific proposals follows:

Article 5 (next to last line). Strike out "and technology"; substitute "technology and modern equipment".

Article VI—2, strike out subparagraph (A), (C) and (D). Article VI—1(A) insert "cultural" after "scientific".

Article VI—add what was formerly VI—2(D) as new subparagraph (D).

Article VI—2(B) retain as uninterrupted continuation of text.

Foreign Minister's proposal would give nationality treatment to entire content Article VI—1 and 2, except for mineral rights. Embassy sees no objection unless Department, for technical reasons, unable grant similar treatment.

Article VI—4

CONFIDENTIAL [Comment: stamp reading Filed Nov 15 19(illegible)]

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CONFIDENTIAL

Article VI—4 (first sentence) after "nationality" add "on condition that in the selection of the persons referred to,

discrimination against nationals of the other party shall be avoided, and without prejudice to laws designed to protect their employment." Embassy recognizes this amendment would seriously weaken rights which this paragraph seeks to safeguard, and proposes resist acceptance.

Article VIII—4(A), strike out "and most favored nation". Reverse positions of subparagraphs (A) and (B).

Article IX—1(A), strike out. Embassy believes Foreign Minister has not clearly understood meaning this paragraph and will try explain to his satisfaction.

Article X—2, Foreign Minister prefers translate following portion, "in excess of that reasonably allocable or apportionable to its territories, nor grant deductions and exemptions less than these reasonably allocable or apportionable to its territories," into Spanish as, "en exceso de lo que corresponda a los negocios que se realicon en sus territorios, ni concederal deducciones y exenciones menores que las que razonablemente se debau conceder con relacion a los mismes".

Embassy believes that if above Spanish text acceptable, change in English unnecessary.

Article XIII—1 (second sentence). After "sanitation", add "for the protection of the balance of payments". Embassy proposes explain Uruguay already protected by Article XIV—2 of IMF agreement.

Article XV—1(A). After "availability" add "of merchandise and means of payment". If Uruguayans insist, Embassy proposes yield this point since availability foreign exchange is commercial consideration and use accumulated balances guaranteed in Protocol 6.

Foreign Minister stated late today Uruguay will propose no further changes.

[Typewritten name illegible]

JSP:RWP

CONFIDENTIAL

Copy of Outgoing Telegram, U.S. Department of State to U.S. Embassy, Montevideo, Uruguay Dated November 10, 1949

DEPARTMENT OF STATE

CONFIDENTIAL
Classification

Control 3100
NOV 10, 1949
For DC/T Use Only

AMEMBASSY,

MONTEVIDEO.
262

FCN Treaty. Reopening by URUG NEGOTS on provisions previously accepted by them disturbing. URTELS 385 NOV 8; 387 NOV 9. Difficult understand value proposed changes from standpoint URUG interests. DEPT has on several occasions made concessions in belief NEGOT CLD be concluded, only to be confronted with demands for additional changes. Is there any assurance present proposals represent final position URUG GOVT? As counter negotiating tactic, WLD it be helpful for EMB reopen questions on which compromise reached with Gonzalez, or re-propose provisions previously rejected; e.g., those referred to second PARA DEPT A-231 OCT 17 and second PARA DEPTEL 193 AUG. 5. Also ART II(1) and IX(1,2), although accepted by DEPT as amended by Gonzalez, are not entirely satisfactory, and DEPT's original draft preferable. Since NEGOT began, DEPT has developed additional provisions that might be introduced at this time.

Re XVII(3,4), DEPT's position remains as in DEPTEL 250 OCT 29. Although number other proposed changes appear of no substantive importance, others may create serious difficul-

ties. Proposals re VI(4) and Add. Protocol definitely in latter category. Revised translation

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DEPARTMENT OF STATE
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portion ART X(2) introduces substantive change and is unacceptable. EMB SHLD obtain explanation URUG objective so DEPT can consult TREAS expert re possible change English text. INSTRS on certain other details possibly ready early next week; others will require longer study.

/s/ WEBB

WEBB (Acting)

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November 10, 1949 (Cleared with Oakley)

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Letter of Lee R. Marks, Deputy Legal Adviser, U.S. Department of State to Abner W. Sibal, General Counsel, Equal Employment Opportunity Commission Dated October 17, 1978

DEPARTMENT OF STATE

Washington, D.C. 20520

[SEAL]

October 17, 1978

Abner W. Sibal
General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

Dear Mr. Sibal:

This responds to your June 9, 1978 letter to Mr. Hansell about the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan (the FCN Treaty). Your letter asks for our views on four questions; the questions and our views are set forth below.

1. *Does the treaty permit subsidiaries of Japanese companies which are organized under the laws of a state of the United States to fill all its top management positions with Japanese nationals admitted as treaty traders? Would it be inconsistent with the terms of the treaty to rule that even top management positions are subject to Title VII of the Civil Rights Act of 1964 prohibiting discrimination on the basis of race, sex or national origin?*

Article VIII(1) of the FCN Treaty gives nationals and companies of each Party the right to employ, in the territory of the other, "accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." This provision was intended to ensure that U.S. companies operating in Japan could hire U.S. personnel for critical

positions, and vice versa. The phrase "of their choice" should be interpreted to give effect to this intention, and we therefore believe that Article VIII(1) permits U.S. subsidiaries of Japanese companies to fill all of their "executive personnel" positions with Japanese nationals admitted to this country as treaty traders. We express no opinion on what positions would, in a particular case, qualify as "executive personnel."

We do not believe the phrase "of their choice" should be read as insulating the employment practices of foreign companies from all local laws. For example, the Treaty does not in our view confer any right to hire in violation of child labor laws, nor does it require the Department to issue a treaty trader visa to persons otherwise ineligible to enter the United States under the Immigration and Nationality Act. Similarly, we do not believe that it confers any right to discriminate against a particular sex, religious, or minority group.* The right granted by the Japanese FCN Treaty to Japanese enterprises operating in the United States is simply the right to fill certain positions with Japanese nationals; American companies operating in Japan enjoy the equivalent right.

2. *Is the situation different if the company doing business in the United States is not incorporated in the United States?*

Article VIII is addressed to "nationals and companies of either Party . . . within the territories of the other Party." Article XXIII defines "companies" as "corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit." In determining the scope of Article VIII, we see no grounds for

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* Both the Japanese and United States Governments have subscribed to a number of international declarations calling on multinational enterprises to respect human rights and avoid discrimination. See point 7 of the 1976 OECD Guidelines for Multi-national Enterprises and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. These are not binding, but they reinforce our view that Article VIII should not be read as conferring a license to discriminate.

distinguishing between subsidiaries incorporated in the United States owned and controlled by a Japanese company and those operating as unincorporated branches of a Japanese company, nor do we see any policy reason for making the applicability of Article VIII dependent on a choice of organizational form.

3. *What criteria are used by the Department of State in determining what positions are within the scope of the treaty when it issues non-immigrant visas to treaty traders?*

The criteria derive from section 101(a) (15) (E) (i) of the Immigration and Nationality Act of 1952, as amended, and 22 C.F.R. § 41.40 *et. seq.* In addition to the statute and regulations (which do not define "executive personnel"), consular officers have access to the Advisory Opinions of the State Department's Visa Office (special guidance to U.S. consular officers upon request); the Administrative Decisions Under the Immigration and Nationality Laws of the United States by the Board of Immigration Appeals of the INS; and judicial decisions rendered upon appeals from the rulings of the INS.

The Department of State, through its consular officers in American embassies and under limited circumstances its Visa Office in the United States, and the Immigration and Naturalization Service in the case of change of visa requests, determines on an individual basis whether an applicant is entitled to a non-immigrant visa as a treaty trader. In making this determination, both the qualifications of the applicant and proposed position of employment are examined.

In granting a non-immigrant treaty trader visa, the Department (or INS) thus makes an administrative determination that a visa applicant will fill an "executive personnel" position, but this determination is made for the limited purpose of administering the visa laws. We do not believe that the determination should preclude judicial review of the scope of the term "executive personnel" for other purposes, including the application of Title VII.

4. *Is any supervision exercised to determine if persons admitted as treaty traders do in fact operate in the type of position for which they were admitted? What sanctions are imposed if violations are found?*

Under the terms of their visas, treaty traders must file annual reports with the INS to show that they are maintaining their treaty trader status. If, on the basis of information furnished in an annual report, the INS determines after investigation that an alien no longer qualifies as a treaty trader, the INS is authorized to order the alien to leave the country, and, if necessary, to deport the alien (8 U.S.C. Section 1257(9); 8 C.F.R. Sections 241.2 and 241.9). During the course of a nonimmigrant's stay in the United States, the INS also has authority to monitor the alien's employment to insure that it complies with the terms of the alien's visas. Private parties may trigger such an INS investigation by lodging a complaint with the district INS office.

If you have any further questions or if we can provide further help, please let us know.

Sincerely,

/s/ LEE R. MARKS
Lee R. Marks
Deputy Legal Adviser

Cover Letter from Lutz Alexander Prager, Assistant General Counsel, Equal Employment Opportunity Commission to Lewis Steel, Esq., Dated December 14, 1978, With Enclosure from Department of State (March 15, 1978 Letter of Diane Wood, Attorney Adviser, U.S. Department of State)

RECEIVED Dec. 19, 1978

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Washington, D.C. 20506

December 14, 1978

Lewis Steel, Esq.
Eisner, Levy, Steel and
Bellman
351 Broadway
New York, New York 10013

Dear Mr. Steel:

As you requested, I enclose a copy of the State Department's March 15, 1978, letter to the Commission concerning the relationship between Title VII and the 1953 United States-Japanese Treaty of Friendship, Commerce and Navigation.

Very truly yours,

/s/ LUTZ ALEXANDER PRAGER
Lutz Alexander Prager

[SEAL]

DEPARTMENT OF STATE

Washington, D.C. 20520

March 15, 1978

Mr. Earl Harper, Jr.
Assistant General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

Dear Mr. Harper:

I have been asked to reply to your letter of December 21, 1977, to the Department of State requesting its views on the jurisdiction of the Equal Employment Opportunity Commission (EEOC) to investigate and process claims of discrimination relating to "treaty trader" positions. The specific question is whether the Treaty of Friendship, Commerce and Navigation between the United States of America and Japan (the FCN Treaty) should be interpreted to preclude EEOC jurisdiction in a case involving allegations of national origin discrimination in hiring for such positions.

For the reasons stated below, it is our opinion that the FCN Treaty does not divest the EEOC of jurisdiction.

The Civil Rights Act of 1964, as amended, gives the Commission beoad [sic] jurisdiction to investigate any charge filed by a person "claiming to be aggrieved, . . . alleging that an employer ployer has engaged in an unlawful employment practice." Sec. 706(b), 42 U.S.C. § 2000e-5(b). Sumitomo Shoji America, Inc. (Sumitomo), a U.S. corporation, is an "employer" within the meaning of section 701(b), of the Act, and the employee positions involved fall within the meaning of section 701(f). Unlawful employment practices are defined in section 703(a), and they include, *inter alia,* the failure or refusal to hire an individual because of his or her "race, color, religion, sex, or national origin."

Unless the Treaty somehow changes things for purposes of jurisdiction over the subject matter, jurisdiction exists if the charging party claims national origin discrimination and satisfies the other jurisdictional prerequisites, such as the 180 day filing period. The charging parties in this case have done so, as we understand the facts. Since the Civil Rights Act is silent as to the relationship between its provisions and those of the FCN Treaty, it is necessary to read the Treaty with the Act, and see if the two can be reconciled.

The mere fact that Article VIII(1) of the FCN Treaty gives employers the right to employ persons "of their choice" does not mean that the class of employers composed of subsidiaries of foreign companies protected by FCN Treaties is exempt from general U.S. law. In fact, Article I of the FCN Treaty with Japan is the article that provides the general authorization for issuance of "E-1" visas to Japanese treaty traders. However, even assuming Article VIII(1)'s language is fully applicable to treaty traders, our conclusion is the same. *Every employer in the United States has the right to employ the persons of his choice, but that does not mean that he is free to engage in unlawful practices, such as discrimination or unfair labor practices.* The right granted by Treaty to subsidiaries of Japanese companies doing business in the United States is simply the right to employ Japanese persons on the same basis as American nationals. The treaty trader immigration laws and rules implement this objective by permitting entry of Japanese "treaty traders" through procedures far less burdensome that the normal procedures for non-treaty trader aliens seeking to enter the United States for purposes of employment.

Neither the Civil Rights Act nor the regulations issue under the Act contain any specific exemption for "treaty trader" positions. Moreover, the Act's legislative history is also silent. The Act expresses the firm policy of the United States against all forms of discrimination and the FCN Treaty's language does not compel a finding of exemption for "treaty traders." Therefore, we believe that the Commission does have jurisdiction in this case.

Concluding that the Commission has jurisdiction, however, does not dispose of the various issues raised in [words obliterated by interlineation] letter to the Commission concerning the merits of the claim, such as whether the charging parties have alleged national origin discrimination or merely citizenship discrimination, whether "treaty traders" somehow qualify for an exception similar to the job-related exception, and whether "treaty traders" are entitled to any benefits at all beyond the procedural benefits spelled out in the immigration laws.

We would be happy to provide the Commission with our views on these questions if the investigation proceeds.

I hope that you find these comments useful. If you have any questions, or wish to discuss anything in this letter, feel free to call me, at 632-0349, or Victor Vilaplana, at 632-2149.

Sincerely,

/s/ DIANE WOOD
Diane Wood
Attorney Adviser

[Comment: various parts of the above letter have been underlined in handwriting]

Affidavit of Lance Gotthoffer Submitted in Support of Defendant's Motion for Reconsideration, Sworn to September 10, 1979 With Exhibits Attached

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civ. 5641

LISA M. AVIGLIANO, et al.,

Plaintiffs,

—against—

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

AFFIDAVIT

State of New York)
ss.:
County of New York)

LANCE GOTTHOFFER, being duly sworn, deposes and says:

1. I am an attorney associated with the firm of Wender, Murase & White, counsel for defendant Sumitomo Shoji America, Inc., ("Sumitomo"). I make this affidavit in support of Sumitomo's motion for reconsideration of this Court's Opinion and Order dated June 5, 1979 to the extent that it denies Sumitomo's motion for an order dismissing the complaint herein.

2. This motion is based upon newly discovered evidence—certain heretofore unavailable documents only recently made available to the parties by the United States Department of State. This affidavit is submitted to resolve now, at the outset, any possible question as to authenticity.

3. On August 15, 1979, I received in hand from George Lehner, Esq., an attorney advisor in the office of the Legal Advisor, Department of State, Washington, D.C., documents which Mr. Lehner represented to me were true copies of documents from the files of the United States Department of State where such documents were kept. I attach hereto true copies of all the documents given to me by Mr. Lehner, and represented by him to be authentic State Department documents as described above. For the convenience of the Court, an index to the documents is also attached.

4. In light of the foregoing, defendant respectfully submits that these documents have been sufficiently authenticated, and that absent any showing by plaintiffs on this motion that further authentication is required, such documents should be for all purposes in this case, considered duly authentic as required by law.

/s/ LANCE GOTTHOFFER
Lance Gotthoffer

Sworn to before me this
10th day of September, 1979

/s/ DOUGLAS J. DANZIG

Douglas J. Danzig
Notary Public, State of New York
No. 60-4607413
Qualified in Westchester County
Certificate filed in New York County
Commission Expires March 30, 1981

(INDEX TO AFFIDAVIT OF L. GOTTHOFFER)

1. Communication of Department of State to United States Political Adviser for Japan, Tokyo, marked "RESTRICTED No. 63", stamped Nov. 1, 1951, and Annex thereto.

2. Foreign Service Despatch No. 915, from USPOLAD, Tokyo, to Department of State, re FCN Treaty with Japan, dated December 17, 1951.

3. Outgoing Airgram No. A-453, from Department of State (Acheson) to USPOLAD, Tokyo, re FCN Treaty with Japan and Despatch No. 915, dated January 7, 1952.

4. Despatch No. 13, by Office of United States Political Adviser for Japan, Tokyo, re Japanese FCN Treaty, dated April 8, 1952.

5. Outgoing Airgram No. A-49, from Department of State (Acheson), to American Embassy, Tokyo, re Japanese FCN Treaty, dated July 23, 1952.

6. Telegram No. 3989 from American Embassy, Tokyo, to Secretary of State, dated March 28, 1975.

7. Telegram No. 11177 from American Embassy, Tokyo, to Secretary of State, dated August 13, 1975.

8. Department of State Airgram No. A-105 (Kissinger) to American Embassy, Tokyo, dated January 9, 1976.

9. Department of State Instruction, No. A-852, to HICOG, Bonn, re FCN Treaty with Germany, dated January 21, 1954.

10. Foreign Service Despatch No. 2413, from HICOG, Bonn, to Department of State, re FCN Treaty with Germany, dated March 8, 1954.

11. Foreign Service Despatch No. 2529, from HICOG, Bonn, to Department of State, re FCN Treaty with Germany, dated March 18, 1954.

12. Letter of April 29, 1954, from Office of United States High Commissioner for Germany, to Secretary of State, and enclosures, consisting of 16 Notes from the Office of the United States High Commissioner for Germany to the German Ministry of Foreign Affairs re the FCN Treaty with Germany, dated November 2, 1953, November 4, 1953 (1st note); November 4, 1953 (2nd note); November 5, 1953; November 12, 1953; November 23, 1953; December 9, 1953; December 10, 1953; December 12, 1953; December 14, 1953; December 15, 1953; December 16, 1953 (1st note); December 16, 1953 (2nd note); February 5, 1954; February 8, 1954; February 9, 1954.

13. Letter of the Trade Agreements and Treaties Division to the Counselor of Embassy for Economic Affairs, American Embassy, The Hague, Netherlands, dated September 16, 1955.

14. Letter of the Counselor of Embassy for Economic Affairs, American Embassy, The Hague, Netherlands, to the Commercial Policy Staff, Department of State, dated September 28, 1955.

15. Letter of the Trade Agreements and Treaty Division, Department of State, to the Counselor of Embassy for Economic Affairs, American Embassy, The Hague, Netherlands, dated October 28, 1955.

16. Letter of the Netherlands negotiator to the Counselor for the U.S. Embassy for Economic Affairs, The Hague, dated October 22, 1955.

17. Letter of the Netherlands negotiator to the Economic Counselor of the U.S. Embassy, The Hague, dated October 6, 1955.

18. Letter of the Trade Agreements and Treaty Division, Department of State, to the Counselor for Economic Affairs, American Embassy, The Hague, Netherlands, dated November 8, 1955.

19. Letter of the Counselor of Embassy for Economic Affairs, American Embassy, The Hague, Netherlands, to the Commercial Policy Staff, Department of State, dated November 4, 1955.

20. Letter of the Netherlands negotiator to the Economic Counselor, U.S. Embassy, The Hague, dated November 8, 1955.

21. Letter of the Counselor of Embassy for Economic Affairs, American Embassy, The Hague, Netherlands, to the Trade Agreements Division, Department of State, dated November 14, 1955.

Exhibit 1

[Comment: Date "Nov 1 (year illegible)" stamped in upper right of page.]

RESTRICTED

No. [Comment: Number "63" handwritten]

[Comment: Numbers "611.944/6-1651" handwritten]

[Comments: Numbers "611.944/6-1651" stamped on right side of letter as well as handwritten. Letters "CS/R" also stamped on right side. File stamp, which is initialled, appears on lower left side of letter].

To the [blank]
United States Political Adviser for Japan,
Tokyo.

The Secretary of State refers to the Mission's Despatch 246 of August 16, 1951, with enclosures, regarding the development of a negotiation between the United States and Japan for a new treaty of friendship, commerce and navigation. This Government shares the desire expressed by the Japanese, and as set forth in Article 12 of the Peace Treaty, to proceed expeditiously with discussions of such a treaty, with a view to arriving at a mutually agreed text which may be ready for signature as soon after the formal restoration of peace as may be possible. The fact that the Japanese Government has seen fit to pattern its tentative treaty draft upon the model afforded by treaties of the type which the United States has lately entered into with other countries suggests that there is general agreement on the nature, scope and content of a treaty of sufficient extent to augur well for the success of a negotiation.

Ordinarily, the Department prefers to use, and has used in all negotiations to date (except in the special case of Ethiopia), its own "standard" model as a basis for negotiating a treaty of friendship, commerce and navigation. This draft has the advantage, inter alia, of being a document which the Senate has pre-

viously approved and with which it is now familiar. Six mimeographed copies thereof are enclosed. Copies of this draft should be furnished to the Japanese for their study, and as the latest illustration of the Department's views and preferences as to the most suitable approach. However, although the Department would be happy if the Japanese Government should be willing to substitute the Department's standard draft for its own initial proposals as a basis for discussion, the Department will refrain from insisting that this be done. If the Japanese strongly desire, the Department is willing, in deference to the Japanese initiative and as a token of good will, to use the Japanese draft, with certain amendments, as the starting point for developing the negotiation. These amendments are set forth in the Annex hereto.

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In the present instruction and its Annex, the Department has confined itself to setting forth certain basic considerations that affect the formulation, in major outline, of what it would regard as an appropriate basis for treaty discussions. Comments on the details of, and proposals for secondary modifications in, the various provisions of the Japanese draft, are deferred until after a basic negotiating draft is definitely ready and the two Governments are thereupon in a position to commence detailed discussion. (As to the Japanese indication of desire to negotiate also with respect to tariff concessions, consular rights, shipwrecks and double taxation, the Japanese correctly appreciate that these matters are properly treated separately from our FCN Treaty).

The Department is mindful that the Japanese draft proposals forwarded under cover of the despatch in reference, and which constitute the object of the comments in the present instruction, are tentative and that the Japanese expect to give further study

and consideration to perfecting their ideas of the kind of treaty they would like to negotiate. The Department hopes that with the information contained in the present instruction and its enclosures, the Japanese will be able within the reasonably near future to prepare, or assent to, a definitive negotiating draft which will be satisfactory to both Governments as the starting point of detailed discussions. It is understood that the acceptance, as basis for discussion, of the Department's standard draft, or of the Japanese draft amended in the manner suggested in the Annex to the present instruction, will not prejudice the position of the Japanese or of the United States as to the final text of the treaty, nor will it prejudice the right of either to seek such modifications and amendments as it may wish during the course of negotiation.

There are enclosed, in addition to six copies of the Department's standard draft, three copies each of treaties of friendship, commerce and navigation most recently signed by the United States, namely: Greece (August 3, 1951), Israel (August 23, 1951) and Denmark (October 1, 1951), plus the Supplementary Agreement with Italy (September 27, 1951). These treaties, like those with Colombia, Ireland, Uruguay and Italy previously signed and supplied to the Mission and interested Japanese officials, were all developed from the Department's standard proposals of the day. While reflecting many variations and adaptations to the views and special circumstances of the different countries, they all embody the same common denominator of treaty principle and coverage. Copies of all of this material should be furnished to the appropriate Japanese officials, along with comments on their draft along the lines set forth in the Annex to the present instruction.

The Department will await with interest the Mission's report on the reactions of the Japanese Government to the views set forth herein. If the Japanese Government is prepared to accept as a basic negotiating draft the Department's standard draft, or, alternatively, its own draft with revisions corresponding generally to those suggested by the Department, the Department is prepared, as stated in the Department's telegram No. 621 of October 17, to undertake negotiations at an early date with a view to

agreement on a final document. The Department is further prepared to give full

consideration

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consideration to the preference of the Japanese Government for either Tokyo or Washington as the site of negotiations.

The Department's comments on the views of the American Chamber of Commerce on a treaty of friendship, commerce and navigation between the United States and Japan (the Mission's despatch No. 440 of September 19) will be submitted shortly.

Enclosures:

1. Six copies of FCN Treaty (in blank).
2. Three copies of FCN Treaty with Greece.
3. Three copies of FCN Treaty with Israel.
4. Three copies of FCN Treaty with Denmark.
5. Three copies of Supplementary Agreement with Italy.

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EET:CP:HWalker:jn
October 22, 1951

L/E L/T SD BPT Cleared in draft;
OFD—Mr. Young 10/15/51
Commerce—Miss Espenshade 10/1
NA—Mrs. Kallis 10/19/51

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[Comment: Various illegible initials appear on lower part of page along with file stamp dated Oct 26 1951 and Nov 1 1951 at bottom of page.]

ANNEX

Amendments to the draft treaty of friendship, commerce and navigation which was forwarded under cover of Mission despatch 246 of August 16.

In the main, the Japanese draft is in general outline sufficiently close to United States ideas to be an adequate basis for commencing the process of arriving at a mutually agreed final text. In some respects, however, the Japanese draft would need to be amended, if it is so to be used. Such amendments fall into three classes, as described below.

The first type of amendment is of a stylistic order, and is merely desirable rather than essential. It is proposed to substitute the term "companies" for "corporations and associations" wherever used; the simple terms "national treatment" and "most-favored-nation treatment", respectively, with definitions thereof in the definitions Article, for the more lenghy [sic] references to these concepts throughout the treaty; and the term "products" for the expression "articles the growth, produce or manufacture". These devices, used in all United States treaties signed subsequent to that with Italy, save a considerable amount of wordage and contribute to concise sentence structure.

The second group of amendments would be the addition, at appropriate points, of several provisions found in most of the recent United States treaties which are missing from the Japanese draft. These include, notably, the following, the texts of which may be found in the enclosed standard draft at the points indicated in parentheses: provision on commercial arbitration (Article V, paragraph 2); rule concerning the treatment of private enterprises which are under competition from state enterprises (Article XVIII, paragraph 2); paragraph on the employment of technical personnel (Article VIII, paragraph 1); paragraph regarding the national treatment of corporations in the United States, in consequence of the nature of the federal system (Article XXII, paragraph 4); provision regarding the impairment

of vested rights and interests (Article VI, paragraph 4); and reservations with respect to fissionable materials, United States territorial preferences, and the GATT (Article XXI, paragraphs 1 (d), 2 and 3). Should there be special problems with respect to the GATT in the case of Japan, they can be dealt with during negotiation. Paragraph 4 of Article XXI of the United States draft is also necessary. (It may further be noted that the Department has under consideration the adding of new material to its industrial property article, designed to encourage technological interchanges. Should such a proposal be formulated, it will be presented later.)

The third group of amendments consists of several Articles from the Department's standard draft to be substituted in texto for certain Articles of the Japanese draft which diverge so widely from what the Department considers appropriate formulations as to be unsuitable bases for discussion. The substitutions accordingly proposed below are, of course, without prejudice to changes in other provisions in the Japanese version which the Department will wish to introduce during the course of the discussions. Further Japanese study of current United States treaty policy may, indeed, lead the Japanese on their own motion to introduce appropriate secondary revisions in some of their

[Comment: Handwritten on right of page are illegible letters plus "611.944/6-1651".]

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proposals in advance of the opening of detailed discussions.

Article I of the Japanese draft should be replaced by Article II, paragraphs 1 and 3, of the Department's standard draft. It is not possible for the Department to use a treaty of this kind as a vehicle for a wholesale setting aside of United States immigration policy. National treatment is, of course, out of the question; and, since immigrant quotas vary widely from country to country, it is not possible to assure even most-favored-nation treatment to any country as a general proposition. It is, however, possible to stipu-

late most-favored-nation treatment for one special category of entrants, namely, those entering for the purpose of engaging in international trade (i.e., "treaty traders") and who are covered in sub-paragraph (a) of the Department's draft. (The formulation on this subject in the treaty with Ireland, for example, is in most-favored-nation terms). Also, the Department would wish to substitute paragraph 2(d) and (e), of the same Article of its draft, for Article IV, paragraph 3, of the Japanese draft, because the national treatment proviso of the latter gravely weakens a sound rule on freedom of communication and of reporting.

The Mission is undoubtedly aware that there has been pending in Congress a proposal, patterned after Acts already passed in behalf of the Chinese, Filipinos and others, to remove the existing racial bar to the immigration and naturalization of Japanese. The enactment of this proposal, which is now being considered in connection with a comprehensive revision and recodification of the immigration code, would remove not only the feature of United States immigration policy which the Japanese have found peculiarly objectionable but also the particular disabilities in the land laws of Western states which are in terms of aliens ineligible to citizenship.

Article V should be replaced by Article IX of the Department's standard draft. Interference by treaty with State prerogatives in the control of land policies has historically been a subject of great delicacy. On at least two occasions in the past the Senate has rejected treaties with Western European powers that provided national treatment as to land ownership; and it will be noted that none of the recent treaties signed by the United States (China, Italy, Uruguay, Ireland, Colombia, Greece, Israel, Ethiopia and Denmark) attempts to prescribe State policies with respect to ownership of real property.

On the other hand, it has been acceptable to provide national treatment with respect to the leasing of real property necessary to the conduct of treaty activities, notwithstanding some State laws circumscribing alien leaseholds. The right to lease is a valuable treaty right in the United States, as was demonstrated in the case

of the 1911 treaty of commerce and navigation with Japan. The Department, in proposing the formulation in the United States standard draft, is offering to assure leasehold rights.

With respect to ownership rights, the Department is proposing to deal in a special way: namely, through the "de facto reciprocity" formula first broached in the treaty of 1937 with Siam. This formula, devised in an effort to approach the national treatment ideal as nearly as practicable, provides in effect for reciprocal national treatment on ownership to the extent that the State laws

permit;

[End of page]

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permit but it envisages that Japan would be free to withhold this standard of treatment from citizens and corporations of States that do not accord national treatment to Japanese nationals and corporations. A like formula in the 1946 Treaty with China is said to have influenced the States of Nevada and Utah toward ameliorating the Chinese disabilities of their real property laws; and the adoption of the formula in treaties with Japan and other countries would undoubtedly be of pertinence to the reconsideration, now variously evident in the United States, of alien land disabilities still persisting in certain State laws. Expressly anti-Oriental laws have been declared unconstitutional in Arkansas, Oregon and in the lower courts of California; and are understood to have been liberalized by legislative action in Utah and Nevada. In half the States, aliens at present enjoy the same rights as citizens with respect to landholding; and in only a comparatively few States are the disabilities against the generality of aliens of serious proportions insofar as commercial property is concerned.

As to Articles III and VI, attention is invited to Articles VII and VIII of the Department's standard draft, as an improved and definitely preferable approach to the framing of sound rules on the business activities of persons and corporations. It will be

noted that the second paragraph of the latter deals with a subject apparently missing from the Japanese draft, but which the Department did not include in the list, given above, of provisions which it proposes be added to the Japanese draft. For other illustrations of treaty drafting deemed to be an improvement over the China and Italy treaties, see Articles VII and VIII of the Colombia Treaty and Articles XII and XIII of the Greek Treaty. The later formulation of the standard draft (upon which the Israel Treaty is incidentally, based), it may be emphasized, is considered to be superior to these.

Article IX. It is requested that the Japanese withdraw this Article altogether. It is no longer the policy of the United States to enter into treaty undertakings to grant exemptions from military service; and treaties most recently negotiated (Uruguay, Colombia, Greece, Israel, Ethiopia and Denmark) therefore contain no military service provisions. The necessity of maintaining this policy in future negotiations is underscored by action Congress took this summer in amending the Selective Service Act so as to make aliens entered for permanent residence henceforth subject to the draft.

Articles XI through XVII. Since the negotiation of the treaty with Italy, the Department has concluded that all essential provisions on navigation can be compressed into the confines of a single Article. (See Article XIX of the Department's standard). The abbreviated formulation now favored by the Department has, aside from the virtue of compactness, the advantage of closing loopholes that might be present in the longer formulation of the Italy Treaty, through application of the inclusio unius exclusio alterius maxim. Substitution of the Department's standard navigation article is therefore requested. It may be noted that material of the sort treated in Article XIV of the Japanese draft is not included in the Department's draft. The formulation of an acceptable treaty rule on this would require some exploration. (Note: the only provision in this connection to which the Department has thus far agreed in any recent commercial treaty negotia-

tion is Article XXII, paragraph [Comment: handwritten paragraph "3" written in], of the Treaty with Greece).

Article

[End of page]

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Article XXII. Since the negotiation of the treaty with Italy in 1948, on which the Japanese proposal is presumably based, the Department has restudied the whole question of exchange controls, with a view to the formulation of improved rules, especially as the interests of investors are affected. This reformulation, as reflected in Article XII of the Department's standard draft, should be substituted for the Japanese proposal. It may be noted that the major deficiencies of the exchange control article of the 1948 Italian Treaty have now been corrected in a Supplementary Agreement with Italy, signed September 27 of this year (see Article III and IV of same).

Article XXIV. This Article creates difficulties. An agreement in which tariff concessions are made (e.g., a trade agreement) is a more suitable vehicle for this sort of thing than is a treaty of the present sort. The establishment of a general valuation policy, moreover, is more properly the function of a multilateral than a bilateral negotiation. Finally, Congress has indicated opposition to the abandonment of the so-called "American selling price" feature of the United States Customs Law. (Note. The valuation rules set forth in the GATT are only provisional, and are applicable only to the extent that the legislation of each contracting party permits).

Article XXVII. The Department proposes that this Article be deleted, and that in lieu thereof there be inserted in the Protocol a provision tentatively worded as follows:

> "With reference to (Article XXXI, paragraph 1 (7)), it is understood that either High Contracting Party may prohibit the importation into its territory or seize, in accordance with the law of such High Contracting Party, any goods of the other High Contracting Party which bear, through labelling, marking, or otherwise, a false indication

of geographic or commercial origin or which produce a false impression of their true origin. Each High Contracting Party agrees to take appropriate steps to prevent unfair practices involving false indications, of whatever nature, that goods produced or sold in or exported from the territory of such High Contracting Party originate within the territory of the other High Contracting Party or any distinctive place within such territory or are the product of a national of such other High Contracting Party."

The reason for suggesting a Protocol position is that clause (a) of the Japanese Article XXVII (the first sentence of Department's redraft) is already covered in the general language of paragraph 1(7) of Article XXXI of the Japanese draft, and is a specific illustration of the deceptive and unfair practices alluded to therein. The technique suggested obviates possible duplication in the text of the treaty. Another reason for handling the matter in the manner proposed is that the assertion of the right in question, although quite desirable for purposes of emphasis, is strictly speaking superfluous, inasmuch as each Party has this right whether or not the treaty so states.

The second sentence of the Department's counterdraft is a restatement of clause (b), and following, of the Japanese proposal, in what is deemed to be clearer and more meaningful language. It furthermore

[End of page]

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furthermore orients the provision away from the subject of alleged abusive use of what is often known as "distinctive regional and geographical appellations of origin"—e.g., the label "Port" or "Champagne" on vinous beverages not produced in the official Port and Champagne regions of Portugal and France. It is not known that Japan has any name-products of this sort of which she is jealous; and the United States would not wish to undertake to make its own regulations more severe than at pre-

sent, inasmuch as present regulations do in fact prevent the use of such names in a manner calculated actually to deceive the customer as to the true nature and origin of the product, and the United States has been unable to agree with the very restrictive views on the matter nurtured by some foreign governments.

Article XXX. While this Article is not necessarily objectionable, the Department does not perceive any particular need for its inclusion.

Article XXXII. The Department proposes that this Article should be replaced by Article XXIV of its standard draft which, it will be noted, contains a paragraph on consultation as well as one on the ultimate submission of unresolved disputes to the International Court at the Hague. The development of the standard submission clause, which has been included with Senate approval and without significant alteration in each of the nine treaties of the present sort signed by the United States since World War II, is regarded by the Department as an outstanding achievement of its current treaty program; and its inclusion is the clearest kind of indication that the treaty establishes a rule of law.

The Japanese proposal on this score appears to be ambiguous and inconclusive. The objective of a submission, or "compromissory", clause is to provide definitely for the settlement of a dispute. This the Department's formulation does, in the most straightforward manner, by simply saying that any dispute not otherwise settled may be taken to the Court. This ultimate step would presumably be resorted to, in actual practice, only very rarely. The Department's formulation is framed with a view to achieving harmonization of differences of opinions about the treaty before differences emerge into real disputes; is designed to give the greatest encouragement to resolving differences by ordinary diplomatic procedures; and allows every leeway to the two countries to refer any particular dispute to arbitration, or other forum, as they might mutually desire.

[Comment: Note that in last paragraph of the original, the first letter, or first two letters, of the first word in a line are cut from left portion of page].

[Comment: Illegible initials on lower left of page along with name "HWalker:jn" plus illegible date. These have been initialled by hand "HW"]

Exhibit 2

AIR PRIORITY / PRIORITY	RESTRICTED Security Information *(Security Classification)*	DO NOT TYPE IN THIS SPACE 611.944/12-1751

[Comment: Illegible initials appear in upper right of page]

FOREIGN SERVICE DESPATCH

FROM : USPOLAD, Tokyo 915 (Desp. No.)

TO : THE DEPARTMENT OF STATE, WASHINGTON

December 17, 1951 (DATE)

REF : Misdes 871, December 7, 1951

4 For Dept. Use Only bs	ACTION FE REC'D DEC 22	I N F O	DEPT. REP DCR OLI E L / OTHER COMM TAR TR

SUBJECT : FCN Treaty with Japan

Further exploratory talks have been held with officials of the Ministry of Foreign Affairs in connection with the Department's standard draft for an FCN Treaty. In addition to the points raised regarding the preamble and first five articles of the standard draft—as reported in the despatch under reference—the Ministry's representatives have made the following informal proposals and requests for further clarification by the Department:

Article VI:

1. The Japanese propose that the phrase, "shall not be subject to molestation or to entry without just cause", be amended to

read "shall not be subject to unlawful entry or molestation". They declare that the latter phraseology is not only clearer when translated into Japanese, but also that it follows more closely the wording employed in the treaties with Ireland, Israel, Greece, and Denmark.

2. The phrase "full equivalent of the property taken", is still under consideration by the Japanese who state that local laws permit compensation in kind in certain cases. It is not believed, however, that they will press their suggestion for a modification in this wording.

3. The Japanese believe that Paragraph 4 of this Article should—because of its subject—be an entirely separate article, employing exactly the same phraseology. They point to the treaty with Greece as an example of this separate treatment.

4. The Japanese further propose that the extension of national and MFN treatment in Paragraph 5, Article VI, should not be limited to Paragraphs 2 and 3, as specified in the standard draft, but should also extend to Paragraph 1. Their suggested change reads "with respect to the matters set forth in Paragraphs 1, 2, and 3 of the present Article".

Article VII:

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1. In view of restrictions already in effect regarding the business activities of foreigners in Japan, the Ministry's representatives declared that Article VII in its present form was far too general and would be subject to various interpretations when translated into Japanese. They raised a number of questions regarding this article and concluded that they preferred the more precise form employed in the treaties with other countries. They proposed, therefore, that Articles VII and VIII of the treaty with Colombia be substituted for Article VII of the standard draft.

2. The Japanese further pointed out that Japan presently restricts the purchase of stocks in local currency by foreigners, and propose that a reservation on this point be incorporated in a protocol to the treaty.

3. In connection with Paragraph 2, Article VII, of the standard draft, the Japanese questioned whether certain rights acquired by foreigners under the Occupation would be exempt from the application of new limitations imposed on aliens. This is another expression of the Japanese hope that none of the "unusual conditions of Occupation" will be further supported under the provisions of the treaty.

4. If their proposal regarding the use of Articles VII and VIII of the treaty with Colombia is not acceptable, the Japanese will request consideration of a new draft Article VII clearly enumerating the various types of business activities contemplated under this article.

Article VIII:

1. The Japanese stated that they prefer the wording employed in the treaty with Greece, and propose that Paragraph 1 of this article be so amended. They propose, therefore, the additional phrase "on a temporary basis" after the clause "shall be permitted to engage". They further propose another addition towards the end of the paragraph so that this might read, "such nationals and companies, for the exclusive account of their employers in connection with the planning . . ." The Department's comments on these points would be appreciated,

since an explanation of why this wording may have been necessary only in connection with Greece might satisfy the Japanese representatives.

2. The Japanese further propose that Paragraph 2 be amplified to enumerate the professions reserved to nationals (pilots, notaries public, et cetera), as was done in the treaties with Greece and Denmark.

3. Also in connection with Paragraph 2, the Ministry's represtatives [sic] questioned whether Japanese in the United States were not in fact barred from certain professions by various State laws "merely by reason of their alienage". Further information was requested regarding

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the practice of law, medicine, and engineering in the various States. The Department's comments on this point—regarded as of great importance by the Japanese—would be most helpful.

4. The question was also raised as to whether Paragraph 3 of this article should not be included in Article VII, because of its similar subject matter.

Article IX:

1. The Ministry officials urged that the standard draft article—the only one which specifically establishes one set of standards for Japanese and another for Americans—be revised. They strongly requested the deletion of Paragraphs 1 and 2, and the adoption of a "uniform formula applicable to both parties"

as in the treaty with Denmark. They pointed out that Article IX in its present form would raise serious problems in the Diet regarding Japanese ownership of real property in various States—a subject on which Japanese officials are particularly sensitive. The Ministry's representatives declared that they plan to discuss this point with the Prime Minister, but will await the Department's reply on the acceptability of the wording employed in the treaty with Denmark.

2. The Japanese requested information as to the "enterprises carrying on particular types of activity" (Paragraph 4) in which alien interests are restricted. They expressed particular interest regarding the types of enterprises of this kind which might exist in the United States.

Article X:

The Japanese representatives stated that they understood that the question of copyright protection need not be covered in a treaty of this kind, since other appropriate international agreements refer specifically to copyrights. They added, however, that industrial property rights are similarly treated under the "Convention d'Union pour la Protection de la Propriete Industrielle", recently ratified by both the United States and Japan. They question the need, therefore, for dealing with industrial property rights—and not with copyrights—in the present treaty and request full clarification of this point in order that an adequate explanation may be made to other Ministries and the Diet.

Article XI:

1. With respect to clauses (a) and (b) of Paragraph 5, Article XI, the Japanese expressed a preference for the terminology employed in the treaty with Colombia. They propose, therefore, that "specific tax advantages" in the standard draft be amended to read "specific advantages as to taxes, fees and charges", and that the following clause (b) read "accord special advantages" instead

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of the standard draft's "accord special tax advantages".

2. In clause (c) of Paragraph 5, the standard draft mentions special provisions with respect to "non-residents", while the treaty with Ireland (Article IX) uses the terminology "non-resident nationals". The Japanese indicated they prefer the latter phraseology, but that they will study this point further if any clarification of the standard draft wording can be furnished.

Article XII:

The Ministry's representatives appeared to agree with Mission officers that this article on exchange controls will permit the continuation of measures to safeguard Japan's balance of payments position. The Japanese pointed out, however, that it will be necessary at times to limit import allocations in one currency in order to promote imports from a specific area (an example is the present emphasis on imports from the Sterling Area because of Japan's excessive holdings of sterling). If such freedom of action is not contemplated under Article XII—or if it might be restricted under Paragraphs 3 (b) and 5 of Article XIV—the Japanese may request the addition of another clause similar to that on inconvertible currencies covered in Paragraph 5 of the Protocol to the treaty with Uruguay. The Department's earliest comments on the question raised by the Japanese—and on their proposal for an additional clause similar to that in the Protocol with Uruguay, or in Paragraph 6 of the Protocol to the treaty with Israel—would be appreciated.

Article XIII:

No questions were raised on this article by the Ministry's representatives.

Article XIV:

1. The Japanese point out that the last sentence in Paragraph 1, beginning "A like rule . . .", is not contained in any other United States treaty. Although they indicated they had no objection to this clause, they requested its further clarification. According to the Japanese interpretation, MFN treatment with regard to the international transfer of payments for imports and exports refers to the actual transfer formalities, and does not limit Japan's right to discriminate against any currency or country in the implementation of its quarterly foreign exchange budgets. The same reservation is made in connection with Paragraphs 2 and 3 b regarding restrictions on imports under the quarterly budget system.

2. With respect to Paragraph 3, the Japanese point out that sub-paragraph (a) is not included in the treaties with Colombia and other countries. Japan presently publicizes its quarterly foreign exchange budgets and issues specific import allocation notices.

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Government officials believe, however, that the latter probably result in price increases on the part of foreign suppliers, and it is possible that the import notice system may be modified. Al-

though the Japanese are not opposed in principle to this sub-paragraph, they do not feel that it is a matter properly included in a bilateral treaty. Since this is a general subject of interest to all countries, multilateral treatment is preferred. The Department's comments on the need for the inclusion of sub-paragraph (a) with respect to Japan alone have been requested by the Ministry's representatives.

3. The Japanese wish to impose restrictions on imports of prison-made goods, and on exports of national treasures and certain natural resources subject to conservation controls. They inquired whether such restrictions were properly covered by Paragraph 4 ("prohibitions or restrictions on sanitary or other customary grounds of a non-commercial nature"). The Mission's explanation that this clause gave Japan the right to impose restrictions along the lines indicated above was accepted by the Ministry's representatives.

4. The rather broad terminology employed in Paragraph 5 regarding national and MFN treatment "with respect to all matters relating to importation and exportation" has also been questioned in connection with foreign exchange budget allocations. The Japanese want to make certain that their present frankly discriminatory import allocation policies are permissible under the various articles of the treaty.

Article XV:

No reservations on the part of the Japanese representatives.

Article XVI:

No reservations.

Article XVII:

A number of questions were raised by the Japanese in connection with state trading in view of the existence of the Government Monopoly system (e.g., on tobacco and salt) in Japan. All points were explained satisfactorily, but the Japanese again requested assurances that their Monopoly trading could be carried out un-

der foreign exchange budget policies without contravening this or other articles in the standard draft. They pointed out that Government Monopoly purchases could be made from certain sources, despite higher costs as compared with other suppliers, in order to utilize inconvertible currencies. At the present time, Sterling Area prices on some commodities are 30 per cent higher than dollar area prices. Clarification is requested as to whether a Government Monopoly could procure Sterling Area goods regardless of the price factor—thus

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reducing Japan's mounting sterling credits—within the framework of Article XVII.

Although progress has been somewhat slow in the past four informal conferences—the Japanese attaching great importance to the various points outlined above—it is believed that the exploratory talks may be concluded by December 18. The Ministry's representatives have indicated that they will begin discussions about December 18 with other Ministries to ascertain their views on what may be points of negotiation in the contemplated formal negotiations. They have informed the Mission that, in order to prevent leakages to the press which they regard as likely, they will use the published text of the treaty with Colombia in their discussions with other Ministries. They have requested, however, that the various proposals and questions now reported, receive prompt consideration as they may be called upon for detailed explanations by other Government agencies. The Ministry's representatives stated that they believe that the Japanese

Government would be ready to proceed with formal negotiations by about January 15, 1952.

The Department's earliest reply on the various questions and proposals set forth above would be appreciated.

For the Political Adviser:

[Comment: Document is signed]

Peyton Kerr
First Secretary of Mission

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Exhibit 3

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OUTGOING AIRGRAM
DEPARTMENT OF STATE DIVISION OF
COMMUNICATIONS AND RECORDS
TELEGRAPH BRANCH

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CIA Subject: FCN Treaty with Japan. Mission's
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This is the fourth in the series of replies to ref. despatch.

Article VII.

1. The first paragraph of this Article can be considered the heart of the treaty; it is the basic "establishment" provision, prescribing the fundamental principle governing the doing of business and the making of investments, in a treaty which is above all a treaty of establishment. A satisfactory formulation of it, and its corollary provisions in the remainder of the Article, is therefore of particular importance and to be approached with especial care.

The new standard formulation of Article VII (and its companion, VIII) as proposed to Japan has already appeared in the treaty with Israel, but was developed too recently for use in the negotiations leading to the other treaties hitherto signed. Its inclusion in a treaty with Japan would not, therefore, be unprecedented, as the Japanese appear to suppose. The formulation proposed to Japan is considered to be more precise than that formerly in use (as appearing in the Colombia treaty, for example); and it is not believed that the substitution of the Colombia treaty wording would meet the avowed Japanese desire for greater precision. Rather, the contrary is probably the case.

While the formulation as found in the Colombia treaty is a respectable, worthy and much used one, it has been open to certain criticisms. The use of the recitative technique ("commercial, manufacturing . . . etc.") for describing the types of activities covered by

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covered by the national treatment rule needlessly leaves play for interpretation as to exactly what businesses are and what are not covered, especially the borderline cases; and the residual rule applicable to types of activities not covered by national treatment is not as adequate as might be, among the latter being activities in which Americans have heavy investment interests abroad (mining, petroleum, public utilities and tropical agriculture). This formulation has also led sometimes to translation difficulties, as well as to the need for devising various explanatory materials in the Protocol and interpretative minutes. The Department has en-

deavored to remove or reduce such criticisms by the device employed, in the new standard formulation, of first stipulating the principle of swooping coverage for all business activities, of every type and in whatever juridical form (paragraph 1), and, second, of then drafting an exception precisely defining what is not so covered and of stipulating the rule applicable thereto (paragraph 2). Although the Department considers the new standard formulation definitely preferable in general, it will keep open mind about the possible substitution therefor of the Colombia formulation in the Japanese case, if after further discussion and study of Japanese views and circumstances it should transpire that this would be expedient.

2. As to restrictions applicable to alien purchase of Japanese securities, reference may be made to paragraph 4 of Article D for Department's standard provision in this connection. This reservation is of limited scope, in conformity with the purposes and scheme of the Department's treaty proposals. If it is not adequate for the Japanese, it will be necessary to have exact information as to wherein and why it is inadequate, as a prelude to exploring what if any adjustment may be satisfactory and proper. The Department approaches with caution any proposal to weaken the principles it advocated with respect to equality of opportunity in investment and business.

3. The FCN treaty is not designed to continue the occupation or any features thereof. Except that the conclusion of the treaty presupposes full Japanese sovereign status, the treaty in and of itself

itself is in principle entirely neutral as to occupation matters. However, the bearing of paragraph 2 of Article VII on the continuance of private rights that may have become established under and during the occupation may be a different question, concerning which the Department would not care to venture an opinion in vacuo. It is therefore requested that the Japanese explain just what situations and problems they visualize in this connection.

4. As mentioned under point 1 above, the Department, while not yet ready to concur in substituting the Colombia treaty wording, does not foreclose the possibility of accepting the Japanese suggestion to this effect after further exploration of the exact Japanese objections to the present standard wording. It would probably help in the analysis of the problem to have from the Japanese more concrete information as to what they mean by a "new draft clearly enumerating the various types of business activities contemplated."

Article VIII.

1. The Japanese suggestions evidently relate to the second sentence of paragraph 1, and not to the first sentence. The two additional phrases mentioned, as incorporated in the Greek treaty, were not there regarded as changing in any significant way the intent of the provision. They rendered explicit what was already pretty much implicit in the original wording. In the Department's opinion they are rather unnecessary, as they merely add superfluous wordage to an already wordy sentence; but the Department would undoubtedly be willing to accept them if the Japanese feel they would be necessary and appropriate.

2. Before discussing a possible enumeration of particular professions to be excepted from the rule of paragraph 2, the Department would wish to have a complete list of those which the Japanese would want to be so enumerated; and a serious consideration of whether, in light of the remarks under "3" below, the Japanese

indeed

indeed wish to press for any exceptions. While it may be possible, if necessary, to consider excepting a limited number of professions that enjoy an especially sensitive status, the Department might be inclined rather to favor dropping paragraph 2 altogether than to have it seriously undermined by an immoderate list of reserved professions.

3. There are indeed numerous state laws barring aliens from the practice of various professions. All states (including the District of Columbia) require that attorneys-at-law be citizens. As to physicians, thirteen impose citizenship requirements and an additional twelve do not license aliens to practice unless they have filed declaration of intention to become citizens, making a total of 25 having alienage disabilities. As to engineers, seven impose citizenship requirements, and an additional seven exclude nondeclarant aliens, for a total of 14. (The foregoing is derived from a compilation made in 1946. If past experience is a reliable guide, more up-to-date information could be expected to show a greater, rather than a less, amount of restrictions against aliens). There are, of course, numerous other professions and occupations (ranging from accountant to wrestling promoter) which are reserved in the laws of one, several, or many states. The pattern is very variable and uneven.

The existence of such statutory disabilities, of course, underscores the advantage to the Japanese of including paragraph 2 in the treaty. The treaty, being the supreme law of the land and enforceable as such before the court, is paramount over all state

legislation. To the extent that the treaty contained a national treatment provision on the professions, any contrary provisions of state law would be *ipso facto* overriden, insofar as Japanese nationals were concerned.

4. The question of where the provisions of paragraph 3 may most logically be carried is essentially a question of force; and the Department does not visualize any difficulty in reaching perfect agreement thereon with the Japanese.

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Exhibit 4

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Encl. No. 4
Page #1 of 5
Desp No. 13—Tokyo
[Comment: "Desp No. 13" is circled]

Office of the United States Political Adviser for Japan, Tokyo.
Tokyo.

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MEMORANDUM OF CONVERSATION

Subject: Informal Discussions on the United States Standard Draft Treaty of Friendship, Commerce and Navigation

Participants: For the Ministry of Foreign Affairs:
Mr. Kenichi OTABE, Vice Director, Economic Affairs Bureau
Mr. Haruki MORI, Chief, First Section, Economic Affairs Bureau
Mr. Takeshi KANEMATSU, Secretary, First Section, Economic Affairs Bureau
Mr. Kay MIYAGAWA, Secretary, First Section, Economic Affairs Bureau
Mr. Masao OSATO, Chief, Fourth Section, Treaties Bureau
Mr. Mikizo NAGAI, Chief, Sixth Section, Economic Affairs Bureau

For the Office of the United States Political Adviser, Japan:
Mr. Jules BASSIN, Legal Attache
Mr. Dudley G. SINGER, Commercial Attache
Mr. Robert W. ADAMS, Second Secretary

Place: Office of the United States Political Adviser, Tokyo, Japan.

Date: Tuesday, April 8, 1952.

FOURTEENTH INFORMAL MEETING

ARTICLE XX

Mr. Otabe stated that in order to avoid any possible differences in interpretation it should be clearly understood that the meaning of the word "transit", as used in Article XX, was the same as that used in Article V, paragraph 1 of the GATT, which states:

> "Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this Article 'traffic in transit'."

Mr. Otabe added that it should also be understood that "transit through the territories of each Party", mentioned in Article XX, includes passengers, baggage, and products carried by aircraft.

Mr. Singer replied that the GATT definition of "transit" was acceptable in interpreting Article XX, and that Mr. Otabe's understanding with reference to

the inclusion of aircraft traffic was correct.

Mr. Otabe stated that under present regulations, export validations are required in Japan for the temporary unloading and trans-shipment of cargoes when these involve specific commodities subject to export licensing under Japan's security export control procedures. He asked for confirmation of his understanding that the implementation of security export controls would not be regarded as constituting "unnecessary delays and restrictions", as mentioned in Article XX.

Mr. Adams replied that Mr. Otabe was correct in his understanding, and that security measures, including export validations and licenses, were permissible under paragraph 1(d), Article XXI.

ARTICLE XXI

Mr. Otabe referred to previous discussions on Article VIII (at the fifth meeting, March 7, 1952) when the Japanese side had proposed that the second sentence of paragraph 3 (i.e. "Nothing in the present Treaty shall be deemed to grant or imply any right to engage in political activities.") be deleted from that Article in as much as this clause was of general application. Mr. Otabe stated that this provision might more appropriately fit in Article XXI, and he now proposed that it be inserted in the latter Article.

Mr. Adams replied that when this clause was included in the provision on general exceptions in other United States FCN Treaties (for example in the Treaties with Colombia, Israel, Uruguay and others), the phraseology employed was: "The present Treaty does not accord any rights to engage in political activities". Subject to the views of the Department of State, which might prefer to use the terminology just mentioned, Mr. Adams suggested that this Article be amended as proposed by Mr. Otabe (i.e., that the second sentence, paragraph 3, Article VIII be inserted in Article XXI as paragraph 3-bis, for subsequent re-numbering in the final draft).

Mr. Otabe stated that the Japanese side earnestly desired that the second sentence of paragraph 3, Article XXI, reading,

"Similarly, the most-favored-nation provisions of the present Treaty shall not apply to special advantages accorded by virtue of the aforesaid Agreement" (i.e., GATT), be deleted from this Article. Mr. Otabe pointed out that since Japan is not a member of the GATT, such concessions as are granted by the United States under a multilateral Agreement not yet open to Japan, would be outside the scope of the Application of most-favored-nation treatment. The purpose of the present treaty prescribing unconditional most-favored-nation treatment would therefore actually be defeated in practice. Furthermore, he said, since the United States is in fact granting the GATT concessions to Japan, the deletion of this sentence would have no effect on the actual relations between the two countries. He again pointed out that the present FCN Treaty will become a model for future treaties to be negotiated between Japan and other countries, and that it was feared that the inclusion of this sentence would establish an unfavorable and most unfortunate precedent, particularly in connection with early negotiations anticipated between Japan and countries already in the GATT.

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Mr. Singer stated that the Department of State had proposed and secured the standard GATT reservation in previous negotiations on the assumption that the country concerned was actually free to come into the GATT, and that any failure on its part to be in the GATT, being of its own choosing, had no effect on the propriety of this reservation. He pointed out that it was not the desire of the United States to use the GATT reservation in order to impose unequal trade relations, and that the Department of State had indicated that some adjustment might be made in the present case in view of the special

circumstances involved. There was as yet no definite idea as to what the appropriate solution might be, but it was believed that it should be in the nature of a clarification or qualification of the third paragraph.

Mr. Adams added that paragraph 3 was essential to the FCN Treaty, but that the American side would be most willing to consider any solution the Japanese would desire to submit. He stated that a bilateral treaty could not, of course, commit the United States to any course of action inconsistent with its obligations under the GATT, and that it appeared therefore that any qualification suggested by the Japanese side should be made with reference to the second sentence of paragraph 3, and not to the first sentence.

Mr. Bassin added that the Department of State wished to reassure the Japanese representatives that their point of view was fully appreciated, and that it was prepared to approach this problem in a sympathetic manner, fully confident that a mutually satisfactory solution can be found.

Mr. Otabe replied that further consideration would be given this matter, and that the Japanese side would be prepared to discuss a proposed clarification or qualification of this paragraph, possibly at the next meeting.

With respect to paragraph 4, Article XXI, Mr. Otabe asked for a definition of "limited purposes". He asked whether a treaty trader or an employee of a Japanese company, permitted to enter the United States in connection with the activities of that company, might subsequently enter the employment of another company, for example of a domestic American firm, without violating the provisions of this paragraph. He also inquired whether employment in another Japanese firm, for example a subsidiary or affiliate of the company originally employing this individual, would be permissible.

Mr. Adams replied that a treaty trader or an employee of the type mentioned by Mr. Otabe would be permitted entry into the United States as a non-immigrant, subject to specific

limitations on his activities. He added that various types of visas of a non-immigrant or temporary character are issued for entry into the United States; these are granted subject to varying conditions, qualifications or restrictions, and are valid for varying periods, ranging from a few months (for tourists) to an indefinite period of stay (for the so-called treaty traders). The latter are issued a visas of indefinite tenure, valid for so long as they continue to promote trade and commerce between the United States and their country. These individuals could change employment while in the United States, provided, of course, the character of their employment remained unchanged and they continued to promote trade and commerce between the United States and their country. This change could be made with the prior knowledge and approval of the appropriate officials of the

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Department of Justice (the Immigration and Naturalization Service of the United States).

In reply to further questions put by Mr. Nagai, Mr. Adams stated that it is only the individual who enters the United States as an immigrant for permanent residence who is not subject to specific limitations or restrictions on his business or professional activities. Mr. Adams added that the Japanese employee previously mentioned by Mr. Otabe would not be permitted to resign from a Japanese firm in order freely to seek employment in the United States. It was possible, however, for this employee to leave one Japanese branch firm to work for an affiliate or subsidiary of that firm, or even for another legitimate Japanese enterprise also engaged in promoting commerce between Japan and the United States, without losing his treaty trader status, provided the prior approval of the Department of Justice were obtained.

ARTICLE XXII

Mr. Otabe asked for a clarification as to the difference between corporation and company, and for a definition of partnerships and other associations as used in paragraph 3, Article XXII.

Mr. Bassin replied that a company is a society or association of persons interested in a common object and uniting themselves for the prosecution of some commercial or industrial undertaking or other legitimate business. The word, he added, is a generic and comprehensive term which may include individuals, partnerships and corporations. Furthermore, the term is not necessarily limited to a trading or commercial body, but may include organizations to promote fraternity among its members and to provide mutual aid and protection. He added that the word is sometimes applicable to a single entrepreneur.

Mr. Bassin stated that a corporation, on the other hand, is an artifical person or legal entity, created under the authority of the law of a state or subdivision thereof. It consists of an association of numerous individuals as a group under a special denomination which is regarded in law as having a personality and existance distinct from that of its several members. A corporation is vested with the capacity of continuous succession, either in perpetuity or for a limited term of years, and acts as a unit or single individual in matters related to the common purpose of the association within the scope of the powers and authority conferred upon it by law. The words "company" and "corporation" are commonly used as interchangeable terms. Strictly speaking, however, Mr. Bassin said, a company is an association of persons for business or other purposes and may be incorporated or not.

Mr. Bassin further stated that a partnership is a voluntary contract or association between two or more persons to place the money, effects, labor and/or skill of some or all of them in lawful commerce or business, with the understanding that there shall be a proportionate sharing of the profits and losses among them. An association, Mr. Bassin stated, is the union of a number of persons for some special purpose or business. It is

generally an unincorporated society, and may consist of a body of persons united and acting together without a charter but pursuant to the methods and forms used by incorporated bodies for the prosecution of a common enterprise. The word "association" is a generic term and may at different times

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comprehend a voluntary association, such as a partnership, which is dissoluble by the persons who formed it, or a corporation dissoluble only by law.

Mr. Otabe stated that these definitions were satisfactory and would be helpful in properly translating this Article into Japanese. He then asked if the various religious groups and foundations in the United States were considered juridical persons, and whether they were included in paragraph 3.

Mr. Bassin replied that organized religious groups and foundations may be juridical persons, but are usually unincorporated associations.

Mr. Otabe inquired whether a Zaidan Hojin was covered by paragraph 3, and, if so, what would be the nature of national treatment accorded such organizations in the United States. He explained that a Zaidan Hojin is a duly organized juridical person with given property, established for the purpose of employing or disposing of said property for a given public purpose. An example of a Zaidan Hojin, he added, would be an endowed private library.

Mr. Bassin replied such an organization would be considered a juridical person in the United States, pursuant to the provisions of paragraph 3, if it were so considered in Japan.

Mr. Nagai then asked what "juridical status" meant, and inquired whether the recognition of juridical status mentioned

in paragraph 3 meant anything more than the recognition of the existence of a juridical person.

Mr. Bassin replied that "juridical status" meant "legal status", the legal position of an organization in, or with respect to, the rest of the community. The recognition mentioned in the second sentence of paragraph 3, he added, meant merely the recognition by either Party of the existence and legal status of juridical persons organized under the laws of the other Party.

It was then agreed that the next meeting would be held on Friday, April 11, 1952, with discussions to begin on Article XXIII.

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Exhibit 5

OUTGOING AIRGRAM

[LETTERHEAD OF DEPARTMENT OF STATE]

[NOTE: Each page of this document is typed on Department of State letterhead.]

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2449

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AMEMBASSY,
TOKYO

A-49, July 23, 1952

[Comment: Stamp indicating nos. "611.944/6-1952" appears along right margin of page]

SUBJECT: FCN Treaty. Interpretation of Certain Provisions Embassy Despatch 269, June 19, 1952

There follow comments on the specific questions raised in reference Despatch:

a. The analysis of this question begins with the second sentence of Article XXII, Paragraph 3, which establishes that whether or not a juridical entity is a "company" of either Party, for treaty purposes, is determined solely by the place of incorporation. Such factors as location of the principal place of business or the nationality of the majority stockholders are

disregarded. Under such a simple test, however, nationals of third countries could indirectly but effectively secure valuable treaty rights through taking advantage of liberal corporation laws. Thus to take a hypothetical example, citizens of country X which had refused to make a reciprocity treaty with Japan, and which was even on bad relations with Japan, might, nevertheless, enjoy unilaterally many business advantages in Japan, ordinarily accruing only to friendly treaty nations, by the device of setting up and operating through a Delaware corporation. The purpose of Paragraph 1(e) of Article XXI is to leave each party free to protect itself against such an eventuality, as it might wish, by allowing it to "pierce the corporate veil" of companies chartered under the laws of the other Party, for most treaty purposes.

The rule of Article XXI, Paragraph 1(e) has to do with the treatment one party is obligated to accord to "companies" of the other party, such companies being as defined in Article XXII(3). The rule of the second sentence of Article VI, Paragraph 5, on the other hand, relates to "enterprises" in which such companies (or nationals) have a substantial interest. The word "enterprises" is not a synonym for "companies"; it is a much broader term, having to do with a business undertaking or establishment in the large and popular sense, regardless of juridical

form,

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Corrections made on this original MUST be made on all copies before delivery to Airgram Section, Telegraph Branch.

[Comments: File stamp on upper right of page. Also stamp indicating nos. "611.944/6-1952" upper right of page.
Stamp "C SA" along lower right margin of page, as well as handwritten nos. "611.944/6-1952"

Bottom left of page words imprinted on page, partially deleted.

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Tokyo,
A-49, July 23, 1952

form, nationality, etc.

The rule of paragraph 1(e), Article XXI, has bearing on the second sentence of Article VI(5) only to the extent that the word "companies" is used therein. If an American-chartered company had a substantial interest in an enterprise in Japan, the Japanese Government would be obligated to give the treatment specified if such company were in fact American controlled, but not if such a company were controlled by nationals of third countries. The question of who controls the company is quite distinct from the question of who has what interest in the "enterprise" itself.

Thus the Japanese supposition that there is conflict between the provisions of VI(5) and [Comment: "XXI(a) crossed out with X's" and "XXI(1)(e)" is inserted] is not well grounded.

b. Article IX(1)(a) provides that Japanese nationals and co. panies shall have rights with respect to acquiring, using, and occupying land, structures, and other realty appropriate to the conduct of any activity in which they are entitled to engage pursuant to Article VII. The last sentence of Article VII(2) clearly provides for establishing and maintaining branches and

agencies for the conduct of international transportation activity, which in the Department's intent covers international shipping. In order to make the last point clear, however, the Department authorizes the insertion of the words "shipping or other" before the word "transportation". Insofar, therefore, as tenure rights to wharves, warehouses, and other installations are reasonably necessary to the effective conduct of an international shipping operation, such rights are assured by Article IX(1)(a). Precisely what tenure rights may be reasonably necessary to the effective conduct of such an operation in a particular case, cannot, of course, be determined in vacuo; but the Department does not believe it is necessary to attempt to write more categorical language into the treaty on this point.

It should be further noted that Article XIX(3) provides for non-discrimination as to the access of vessels to ports, and to port and shipping facilities, insofar as such access is afforded to any international shipping on an other than tenure basis.

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Classification

Tokyo,
A-49, July 23, 1952

The right to enjoy the use of all appropriate facilities thus appears to be amply covered, without any further modification.

c. In analyzing the question here presented, it is necessary to distinguish between the ship operator, on the one hand, and the ship builder on the other. The ship operator engages in an establishment activity reserved from the treaty (Article VII(2), first sentence). Thus each party, so long as it does not violate some other provision of the treaty, retains full freedom to subsidize its own citizen-owned, national shipping, without being obliged to extend such subsidies to shipping owned by nationals of the other party.

The "citizens" referred to in 46 USC 1151 are ship operators. The construction subsidy is granted upon application of the ship operator, and on his behalf. The law does not specify that the ship builder, who is ultimately awarded the construction contract, be a citizen. The law speaks only of a "shipyard within the continental limits of the United States" (Sec. 1155) without reference to the nationalities of the owners of the shipyard. By contrast, the citizenship of the ship operator is repeatedly mentioned; and the avowed objective of the act (Sec. 1101) is to foster a citizen-owned merchant marine (not citizen-owned shipyard), [sic] As to the precise question of how this law is "interpreted", the Department is unaware that there has been occasion to interpret it on this specific point, or that any problem has ever arisen over it. The Department does not have the function of interpreting such laws; it can only point out that the law, contrary to the Japanese reading of it, does not provide that ship-building subsidies be restricted to American citizens.

The Department understands that the Embassy would like also two other points to be clarified, as follows:

1. As to the right of non-resident recipients of benefits under Article IV to convert yen payments into dollars. This Article provides national treatment. This means that insofar as this Article is concerned, the American non-resident beneficiary has a treaty right to exchange convertibility only to the extent that a Japanese non-resident would enjoy this privilege under Japanese law and regulation.

Further than this, however, it may be noted that the non-resident American would have such rights as are provided in Article XII; that is, no restrictions on convertibility except as may be allowed by the second paragraph of that Article, and, in situations where restrictions are necessary and allowable, he would enjoy such advantages as may be afforded by the phrase "giving consideration to special needs for other transactions" in Paragraph 3 and by the "no arbitrary discrimination" precept of paragraph 4.

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Tokyo,
A-49, July 23, 1952

-4-

2. As to the precise meaning of the terms "trade names" and "trade labels" in Article X—the Department would have only the following observation to add to the Embassy's previous report of its explanation: These terms are merely by way of illustrating, along with "patents" and "trade-marks", the more common types of industrial property. The phrase "industrial property of every kind" is all-inclusive. It is thus unnecessary to have, in connection with the treaty, highly refined and precise definitions of the concepts "marks", "names" and "labels". It would indeed be quite permissible for Japanese

and American law to differ substantially from each other in this and other industrial property matters. The Article's purpose is to provide national treatment with respect to whatever the laws of the country happen to provide with respect to recognizing and protecting industrial property; and the Japanese may make a free translation of secondary technical terms if transliteration proves to be difficult.

ACHESON

[Comment: Signed by Acheson with initials "(V.G.S.)" on right of page

Stamp "S/S-CR Jul 23 1952 A.M." initialled on lower left.]

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[Comment: Handwritten initials above each]

EDT: CP:HJWalker:dil
7/11/52

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Classification

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Exhibit 6

[SEAL]

DEPARTMENT OF STATE

TELEGRAM

UNCLASSIFIED 0314

PAGE 01 TOKYO 03989 280337Z

14-11
ACTION EA-10

INFO OCT-01 ISO-00 H-02 L-02 SCA-01 VOE-00 /016 W
018438

P 280315Z MAR 75
FM AMENEASSY TOKYO
TO SECSTATE WASHDC PRIORITY 8965

UNCLAS TOKYO 3989

E.O. 11652: N/A
TAGS: CGEN, CVIS, JA, L
SUBJECT: CONGRESSIONAL CORRESPONDENCE: MELVIN CRONIN'S JAPANESE VISA APPLICATION

REF: STATE 27746, TOKYO 1664 AND PREVIOUS

PASS TO SENATOR CRANSTON AND CONGRESSMAN BURTON

1. EMB HAS BEEN ADVISED BY MFA THAT AFTER CAREFUL CONSIDERATION ITS LEGAL STAFF IS OF OPINION THAT THE CASE OF CRONIN AND ANOTHER INVOLVING THE EMPLOYEE OF AN INDIVIDUAL AMERICAN PROPRIETOR DOING BUSINESS IN JAPAN DO NOT RPT NOT COME WITHIN THE PROVISION OF THE TREATY, APPARENTLY BECAUSE CRONIN'S EMPLOYER IS A JAPANESE CORPORATION EVEN

THOUGH ALL STOCK OWNED BY AN AMERICAN. EMB HAS REQUESTED AN EXPLANATION IN WRITING OF THE REASONING ON WHICH THIS OPINION WAS BASED AND THIS SHOULD BE FORTHCOMING NEXT WEEK. AT THAT TIME EMB WILL SUBMIT THE MFA REASONING AND ITS OWN VIEWS WITH RESPECT TO FURTHER ACTION BY EMB AND DEPT AS JAPANESE VIEW OF TREATY OBLIGATIONS IN THESE CASES IS DIRECTLY OPPOSITE THAT BEING FOLLOWED BY U.S.

2. HOWEVER, IN THE INTERESTS OF OUR MUTUAL GOOD RELATIONS, MFA OFFICIAL STATED THAT IT HAD REQUESTED BUREAU OF IMMIGRATION TO ENDEAVOR TO WORK OUT SOME AD HOC BASIS UPON WHICH THE VISA TO CRONIN AND THE OTHER AMERICAN COULD BE ISSUED. AFTER DELAY OF SEVEAL WEEKS BUREAU OF IMMIGRATION HAS INFORMED MFA THAT IT HAS WORKED OUT A QUOTE RATIONALE UNQUOTE AND HAS THEREFORE APPROVED ISSUANCE OF COMMERCIAL VISAS IN THESE TWO CASES. THIS INFO HAS BEEN CONVEYED TO CRONIN'S EMPLOYER WHO IS CONTACTING CRONIN WITH INSTRUCTIONS TO REAPPLY FOR HIS VISA AT THE JAPANESE CONSULATE GENERAL IN SAN FRANCISCO. HOPEFULLY, CRONIN CASE HAS BEEN RESOLVED.

SHOESMITH

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Exhibit 7

[SEAL]

DEPARTMENT OF STATE

TELEGRAM

[Comment: stamp stating: "LEGAL ADVISER Aug 15 1975 Department of State" on right margin]

UNCLASSIFIED 6071

PAGE 01 TOKYO 11177 130524Z

21
ACTION L-03

INFO OCT-01 EA-09 ISO-00 SCA-01 SCSE-00 EB-07 COME-00 TRSE-00 VOE-00 /021 W 047657

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FM AMEMBASSY TOKYO
TO SECSTATE WASHDC 2418

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UNCLAS TOKYO 11177

FOR L/SCA

E.O. 11652:N/A
TAGS: CGEN, CVIS, JA
SUBJECT: GOJ INTERPRETATION OF FCN TREATY

REF: TOKYO 3989, 28 MAR 75

1. AS INDICATED IN REFTEL GOJ FINALLY AUTHORIZED COMMERCIAL VISAS IN TWO CASES IN QUESTION ON STRICTLY AD HOC BASIS CONTENDING AMERICANS INVOLVED WERE NOT ENTITLED TO TREATY BONEFITS [sic]. MFA STATES THAT ITS LEGAL ADVISERS HAVENOT COMPLETED STUDY BUT ARE-PRESENTLY OF VIEW THAT UNDER THE WORDING OF

THE SECOND SETENCE OF PARAGRAPH THREE OF ARTICLE XXII OF THE TREATY A COMPANY INCORPORATED IN JAPAN, OR AN INDIVIDUAL DOING BUSINESS AS SINGLE PROPRIETOR, EVEN THOUGH WHOLLY AMERICAN OWNED, IS NEVERTHELESS A JAPANESE COMPANY AND EXCLUDED FROM TREATY BENEFITS. THE SENTENCE IN QUESTION READS: QUOTE COMPANIES CONSTITUTED UNDER THE APPLICABLE LAWS AND REGULATIONS WITHIN THE TERRITORIES OF EITHER PARTY SHALL BE DEEMED COMPANIES THEREOF AND SHALL HAVE THEIR JURIDICAL STATUS RECOGNIZED WITHIN THE TERRITORIES OF THE OTHER PARTY. UNQUOTE.

2. EMB HAS ARGUED THAT GOJ INTERPRETATION CONFLICTS WITH THE GENERAL AIM OF THE TREATY WHICH IS TO PROMOTE TRADE AND INVESTMENTS BETWEEN OUR COUNTRIES. EMB HAS FURNISHED COMPLETE INFO TO MFA AS TO VIEW OF U.S. THAT

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DEPARTMENT OF STATE

UNCLASSIFIED

Page 02 Tokyo 11177 130524Z

NATIONALITY OF A MAJORITY OF THE STOCKHOLDERS CONSTITUTES THE NATIONALITYOF THE COMPANY. IT HAS ALSO POINTED OT THAT NATIONALS OF A THIRD COUNTRY COULD NOT OBTAIN TREATY BENEFIS SIMPLY BY INCORPORATING IN JAPAN.

3. ACTION REQUESTED: IN ORDER THAT EMB MAY PURSUE THIS QUESTION FURTHER IN AN EFFORT TO OBTAIN MORE RECIPROCAL TRATMENT FOR AMERICANS DOING BUSINESS IN JAPAN, WITHOUT RELY-

ING ON AD HOC DECISIONS, WHICH ARE TIME CONSUMING AND DIFFICULT TO OBTAIN, IT WILL BE APPRECIATED IF DEPT WILL FURNISH INFO AS TO WHETHER ANY OTHER COUNTRIES WITH WHOM WE HAVE FCN TREATIES ADHERE TO INTERPRETATION GIVEN BY JAPANESE. VIEWS OF MAJOR TRADING COUNTRIES SUCH AS FRANCE, GERMANY, ITALY, UNITED KINGDOM, NORWAY AND DENMARK WOULD BE MORE PERSUASIVE THAN SMALLER COUNTRIES. ANY OTHER IDEAS DEPT MIGHT HAVE ON THIS SUBJECT WOULD ALSO BE WELCOME.

SHOESMITH

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Exhibit 8

DEPARTMENT OF STATE

AIRGRAM

UNCLASSIFIED

NO. A-105

TO: AmEmbassy TOKYO

E.O. 11652: N/A
TAGS: CGEN, CVIS, EINV, JA

DATE: 1976 JAN-9 AM 9:45

[Comment: "FCN 2 Japan" appears in handwriting here]

FROM: Department of State

SUBJECT: GOJ Interpretation of FCN Treaty

REF: Tokyo 11177

Department Legal Adviser's office has examined meaning of paragraph 3 of Article XXII of the U.S.-Japanese FCN Treaty signed at Tokyo April 2, 1953, and fully concurs with Embassy's general position as set forth reftel.

Most persuasive arguments we have found are (a) law review article on FCNs by Herman Walker, Jr., who formulated modern (i.e., post-WW II) form of FCN treaty and negotiated many FCNs; and (b) negotiating record of U.S.-Japan FCN, especially Dispatch No. 13 from Tokyo of April 8, 1952. Both documents are enclosed. Walker cites (pp 380-81), para 3 of Japanese FCN as standard definition of company for purposes of treaty, i.e., in the standard FCN treaty "A 'company' is defined simply and broadly to mean any corporation, partnership, company or other association which has been duly formed under the laws of one of the contracting parties; that is, any 'artificial' person acknowledged by its creator, as distinguished from a natural person, whether or not for pecuniary profit." This formulation is intended to avoid such complex questions as the law to be applied in determining

company status. Every association meeting test of valid existence must have its "company" status duly recognized and is then eligible for substantive rights granted to companies under the treaty.

In Dispatch 13 (p. 5), Jules Bassin, Legal Attache to Embassy, stated to Mr. Mikizo Nagai, Chief, Sixth

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Drafted by: L/EB:SRBond:lms Phone No.: 20347
Drafting date: 1-7-67 Contents and Classification Approved by: L/EB:PRTrimble

Clearances: L/T:JBoyd EA/J:DFSmith L/EA:PNorton

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Section, Economic Affairs Bureau, that "the recognition mentioned in the second sentence of paragraph 3 . . . meant merely the recognition by either Party of the existence and legal status of juridical persons organized under the laws of the other Party."

Thus, all that para 3 is meant to accomplish is the establishment of a procedural test for the determination of the status of an association, i.e., whether or not to recognize it as a "company" for purposes of the treaty. Once such recognition is granted, the functional rights accorded to companies under the FCN (for example, the Article VII rights of a company to establish and control subsidiaries) then accrue.

For reasons stated above, argument in para 2 of reftel that nationality of a company is determined by nationality of shareholders is not correct. Rather, a company has nationality of place where it is established (see pp. 382-83 of Walker).

However, this does not mean that GOJ is free to deny treaty rights to U.S. subsidiary set up in Japan. While the company's status and nationality are determined by place of establishment, this recognition does not itself create substantive rights, which are dealt with elsewhere in the treaty. Thus, under Article VII of the Treaty, a national or company of either party is granted national treatment to control and manage enterprises they have established or acquired. Therefore, an American Company (i.e., one organized under U.S. law), may manage its Japanese subsidiary (i.e., a company set up under Japanese law). So too, under Article I, a U.S. national may enter Japan to direct his investment, even though the investment is a Japanese company. In sum, the substantive rights of U.S. nationals and companies vis-a-vis their Japanese investments accrue to them because the treaty gives specific rights to U.S. nationals and companies as regards their investments, and it is irrelevant that, for the technical reasons noted above, the status and nationality of the investment are determined by the place of its establishment.

KISSINGER

Enclosures:

Herman Walker Law Review Article on FCNs
Dispatch No. 13 from Tokyo Apr. 8, 1952

Exhibit 9*

[First Copy]

[SEAL] DEPARTMENT OF STATE INSTRUCTION

UNCLASSIFIED
(Security Classification)

1872 1872

FOR DC USE ONLY

NO.: A-852 January 21, 1954

SUBJECT: Treaty of Friendship, Commerce and Navigation

[Comment: Nos. "611.62a4/1-854" handwritten on page]

TO: HICOG, BONN

Reference HICOG despatch No. 1904, January 8, 1954.

There follow the Department's comments with respect to the points raised by Dr. Paulich at the January 4 meeting regarding the provisions of Article II, paragraph 1.

1. The basic purpose of the treaty trader provision and of the legislation which authorizes the extension by treaty of liberal sojourn privileges for purposes of trade is, of course, the promotion of mutually beneficial commercial intercourse between the parties to the treaty. There is no intent thereby to attempt to regulate the particular form of business entity by which the desired trading activities are to be carried on. Hence it is the practice in administering the treaty trader regulations to "pierce the corporate veil" and to authorize the issuance of treaty trader visas to qualified aliens from treaty countries whose trading activities in the United States would be carried on in the service of a domestic United States corporation. The important consideration is not whether the corporate employer is domestic or alien as to juridical status. The controlling

* Comment: Two different copies of Exhibit 9 were furnished by the State Department. The second copy begins on page 165a, *infra*.

factors are, instead: (a) whether the corporation is engaged in substantial international trade principally between the United States and the other treaty country; (b) whether it is a "foreign organization" in the sense that the control thereof is vested in nationals of the other treaty country, the customary test being whether or not a majority of the stock is held by such nationals; and (c) whether the individual alien who intends to engage in international trading activities in the service of the corporation is duly qualified for status as a treaty trader under 22 CFR 41.70, 41.71 and other applicable regulations.

2. The apparent discrepancy between the treaty and the Immigration and Nationality Act with respect to use of the term "substantial" is of no legal or practical significance either when considered in the treaty trader clause alone or taken together with

the treaty

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EDT:CP:CHSullivan:hc 1/19/54	CP: V.G. Setser
[Comment: Initialed by CH Sullivan]	[Comment: Initialed by V.G. Setser]

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NO.: A-852 HICOG BONN Page 2

UNCLASSIFIED
(Security Classification)

the treaty investor clause. Use of the term "substantial" in the treaty trader provision of the Act merely gives explicit recognition in the law to an administrative practice of long standing. It was not deemed necessary to reword the treaty as a consequence, for the treaty provision as now worded has long been applied in a manner requiring that the trade for which entry is permitted shall be substantial in character. This does not derive from Article II(1)(c), however, but from Article II(3), taken together with the general right to apply reasonable and nondiscriminatory regulations consistent with the intent and purpose of the treaty provision in order to implement the commitment and to protect the privileges accorded thereby from abuse. In the case of the treaty investor provision, however, the term "substantial" has been carried over from the law to the treaty as an aid to its construction and implementation. This was done simply because the investor clause, unlike the trader clause, is new and an established body of interpretation has not yet developed.

It may be noted in connection with hypothetical cases involving substantiality of trade that this requirement is applied in a liberal manner. In determining the substantiality of the trade within the meaning of the treaty trader clause, monetary or physical volume are not used as the exclusive criteria. The intent is to assure that the trade in question is not

a brief, isolated excursion into international trade but a sustained volume of bona fide commercial transactions. Consequently, the number of transactions, the continuous character of the operations and a number of other factors are taken into consideration as well.

(It is believed that Dr. Paulich, in discussing this point, had reference to an unofficial summary of the new immigration legislation prepared by Mr. Frank Auerbach of the Visa Office of the Department of State. This work is entitled The Immigration and Nationality Act: A Summary of Its Principal Provisions, and copies presumably are available in the office of the Supervisory Consul General.)

3. Dr. Paulich's observation that the fixing of the period of sojourn for aliens entering the United States as nonimmigrants is done by immigration officers at the port of entry rather than by consular officers when the visa is issued is correct. However, this procedure is specifically required by law and hence not merely a matter of administrative convenience. Section 214(a) of the Immigration and Nationality Act expressly vests the Attorney General with authority to prescribe by regulation the period of time for which non-immigrant aliens may be admitted to the United States. A treaty trader or treaty investor, by reason of the purposes of the treaty, is regarded as admitted on an indefinite basis as to sojourn, provided, of course, that he maintains his status as a trader or investor under the treaty. Hence the administrative regulations governing entry and sojourn (8 CFR 214e2) contain no specific limitation as to time. This does not preclude, however, requirements that the alien comply with reasonable procedures designed to assure that

he is

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(Security Classification)

he is maintaining his status as a treaty alien and otherwise complying with the conditions of his admission; and the measures referred to by Dr. Paulich are in the nature of such requirements.

SMITH, ACTING

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(Security Classification)

Exhibit 9

[Second Copy]

[SEAL] DEPARTMENT OF STATE INSTRUCTION

1872

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NO.: A-852 January 21, 1954

SUBJECT: Treaty of Friendship, Commerce and Navigation

TO: HICOG, BONN [Comment: Handwritten nos. "611.62a4/1-854" appear on right of page]

Reference HICOG despatch No. 1904, January 8, 1954.

There follow the Department's comments with respect to the points raised by Dr. Paulich at the January 4 meeting regarding the provisions of Article II, paragraph 1.

1. The basic purpose of the treaty trader provision and of the legislation which authorizes the extension by treaty of liberal sojourn privileges for purposes of trade is, of course, the promotion of mutually beneficial commercial intercourse between the parties to the treaty. There is no intent thereby to attempt to regulate the particular form of business entity by which the desired trading activities are to be carried on. Hence it is the practice in administering the treaty trader regulations to "pierce the corporate veil" and to authorize the issuance of treaty trader visas to qualified aliens from treaty countries whose trading activities in the United States would be carried on in the service of a domestic United States corporation. The important consideration is not whether the corporate employer is domestic or alien as to juridical status. The controlling factors are, instead: (a) whether the corporation is engaged in substantial international trade princi-

pally between the United States and the other treaty country; (b) whether it is a "foreign organization" in the sense that the control thereof is vested in nationals of the other treaty country, the customary test being whether or not a majority of the stock is held by such nationals; and (c) whether the individual alien who intends to engage in international trading activities in the service of the corporation is duly qualified for status as a treaty trader under 22 CFR 41.70, 41.71 and other applicable regulations.

2. The apparent discrepancy between the treaty and the Immigration and Nationality Act with respect to use of the term "substantial" is of no legal or practical significance either when considered in the treaty trader clause alone or taken together with the treaty

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NO: A-852 HICOG BONN

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the treaty investor clause. Use of the term "substantial" in the treaty trader provision of the Act merely gives explicit recognition in the law to an administrative practice of long standing. It was not deemed necessary to reword the treaty as a consequence, for the treaty provision as now worded has long

been applied in a manner requiring that the trade for which entry is permitted shall be substantial in character. This does not derive from Article II(1)(c), however, but from Article II(3), taken together with the general right to apply reasonable and nondiscriminatory regulations consistent with the intent and purpose of the treaty provision in order to implement the commitment and to protect the privileges accorded thereby from abuse. In the case of the treaty investor provision, however, the term "substantial" has been carried over from the law to the treaty as an aid to its construction and implementation. This was done simply because the investor clause, unlike the trader clause, is new and an established body of interpretation has not yet developed.

It may be noted in connection with hypothetical cases involving substantiality of trade that this requirement is applied in a liberal manner. In determining the substantiality of the trade within the meaning of the treaty trader clause, monetary or physical volume are not used as the exclusive criteria. The intent is to assure that the trade in question is not a brief, isolated excursion into international trade but a sustained volume of bona fide commercial transactions. Consequently, the number of transactions, the continuous character of the operations and a number of other factors are taken into consideration as well.

(It is believed that Dr. Paulich, in discussing this point, had reference to an unofficial summary of the new immigration legislation prepared by Mr. Frank Auerbach of the Visa Office of the Department of State. This work is entitled The Immigration and Nationality Act: A Summary of its Principal Provisions, and copies presumably are available in the office of the Supervisory Consul General.)

3. Dr. Paulich's observation that the fixing of the period of sojourn for aliens entering the United States as nonimmigrants is done by immigration officers at the port of entry rather than by consular officers when the visa is issued is correct. However, this procedure is specifically required by law and hence not merely a matter of administrative convenience. Section 214(a) of the Immigration and Nationality Act expressly vests the Attorney

General with authority to prescribe by regulation the period of time for which non-immigrant aliens may be admitted to the United States. A treaty trader or treaty investor, by reason of the purposes of the treaty, is regarded as admitted on an indefinite basis as to sojourn, provided, of course, that he maintains his status as a trader or investor under the treaty. Hence the administrative regulations governing entry and sojourn (8 CFR 214e2) contain no specific limitation as to time. This does not preclude, however, requirements that the alien comply with reasonable procedures designed to assure that

he is

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NO: A-852 HICOG BONN Page 3

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(Security Classification)

he is maintaining his status as a treaty alien and otherwise complying with the conditions of his admission; and the measures referred to by Dr. Paulich are in the nature of such requirements.

SMITH, ACTING

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Exhibit 10

[Form of Foreign Service Despatch Memo]

AIR POUCH
Priority

UNCLASSIFIED
(Security Classification)

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FOREIGN SERVICE DESPATCH

2413
Desp. No.

FROM: HICOG BONN

TO: THE DEPARTMENT OF STATE, WASHINGTON

March 8, 1954
Date

REF: OURDES 2394, March 5, 1954, and previous

For Dept. Use Only	ACTION E-4	INFO	DEPT. Rep. 2 DC/R-2 OLI-6 GER-4 L-2
	REC'D 2012		OTHER CIA-7 COM-8 TR-3 FOA-10

[Comment: Above inserts are handwritten]

SUBJECT: New Treaty of Friendship, Commerce, and Navigation: Report on March 4, 1954, Sub-Committee Meeting on U.S. Article V

The Sub-Committee on U.S. Article V regarding judicial rights and commercial arbitration held its second meeting on March 4, 1954. The Sub-Committee members were the same as those reported in reference despatch.

The German side recapitulated the reasons why they could not accord national treatment with respect to security for costs and judgment and submitted the following new formulation for a clause to be inserted into the protocol, adding that it was intended as an "authentic interpretation" of paragraph 1, U.S. Article V:

> Die vertragschliessenden Teile sind darin einig, dass Artikel V, Abs. 1 des Vertrags den Angehoerigen oder den Gesellschaften des einen Teils als Klaeger oder Intervenient vor den Gerichten des anderen Teils von der Zahlung der Kaution judicatum solvi dann Befreiung erteilen sollen, wenn sie
>
> a) entweder ihren Wohnsitz oder ihren dauernden Aufenthalt oder ihren Sitz oder
>
> b) ausreichendes Vermoegen in dem Gebiet des Teils haben, vor dessen Gericht die Klage erhoben wird.

A provisional translation, prepared by the writer, is given herewith:

> "The Contracting Parties agree that Article V, paragraph 1, of the present treaty shall give exemption from security for costs and judgment judicatum solvi to the nationals and/or the companies of one Party appearing as plaintiffs or intervenors before the courts of the other Party if
>
> a) they have either their domicile or permanent residence or seat, or
>
> b) sufficient property

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ACTION COPY—DEPARTMENT OF STATE

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Page 2 of
Desp. No. 2413
From HICOG BONN

in the territory of that Party before the court of which the case is heard."

The U.S. side said the German proposal was interesting and asked whether they were correct in their interpretation that "domicile" and "residence" pertained solely to individuals, whereas "seat" applied to corporations. The Germans confirmed that only natural persons could have a "domicile" or a "residence" and that a juridical person was understood to have a "seat".

The U.S. then asked whether the omission of the word "domicile" would be acceptable. The Germans replied in the affirmative, and the U.S. side then observed that they would consider further whether they wanted to suggest the deletion.

The U.S. side then inquired what requirements a U.S. corporation would have to fulfill in order to be considered as having its "seat" in Germany under German law. The Germans repeated their previous explanations to the effect that a corporation was deemed to be "seated" in a locality in which its administration was. They added that German corporations were registered in the commercial register and that such registration included data concerning the administration of the company. They further commented that a U.S. corporation

having a registered branch in Germany, yet being subordinated to its New York administrative headquarters, might be considered having its seat in Germany if the German branch of the U.S. corporation constituted an independent juridical person. The U.S. side remarked that this explained the basis for their concern, because U.S. corporations would not be able to fulfill the qualifications under German law unless they reincorporated in Germany and thus became a German juridical domestic entity, in which case they would lose their legal status as American juridical entities and become lost from the purview of the provisions. They stressed that a virtually impossible condition would thus be created and, therefore, suggested deletion of the reference to "seat", leaving only the property test for companies. Alternatively, they proposed as a substitute for "seat" the inclusion of the words "permanent establishment". As examples for their theoretical position, they explained that, in accordance with the German statement, the Chase National Bank or the American Express Company, both located at Frankfurt, Germany, would be considered as branches of American enterprises without having their seats in Germany, since their administrative headquarters were in each instance at New York. On the other hand, the Ford A.G. of Cologne and the Opel Works of Ruesselsheim, though owned by American corporations, were incorporated in Germany and were German juridical entities.

The Germans said they understood the difficulties regarding the word "seat" and remarked that the U.S. substitute proposal to insert the words "permanent establishment" (staendige Niederlassung) appeared to reflect the practicalities, though they wondered whether "permanent establishment" might not create problems since courts would have to consider whether or

not a given establishment was of a fictitious nature, and since the courts further might be reluctant to grant exemption from security if an insubstantial establishment were involved. Both sides agreed, however, to consider "permanent establishment" on a tentative and exploratory basis pending further internal consultation.

Some discussion followed as to the requirements a U.S. corporation would have to fulfill to do business in Germany and be considered having its "permanent establishment" there. The Germans stated that, in principle, the registration conditions were the same for a U.S. corporation as for a domestic company. With respect to "permanent establishment", they remarked that these words comprised a *de facto* rather than a legal description.

A third question from the U.S. side was framed as a request for an addition in order to ensure adequate linkage between the protocol and paragraph 5, U.S. Article V: namely, to insert the words "within the framework of" after "the Contracting Parties agree that". In reply to a German question, the U.S. side stated that their suggestion was based on a necessary consideration from the viewpoint of the U.S. to clarify that aliens, in equal circumstances, would not be granted exemptions exceeding those accorded U.S. nationals; and to stress that no special privilege was being established for the treaty alien.

The Germans asked for additional clarification as to the intent of the U.S. proposed insert and noted that in the State of California security for costs and judgment was imposed on a non-resident immaterial of his nationality or his holding of property within the jurisdiction of the court. Concluding that the property test was not applicable in California, the U.S. version would have to be interpreted to mean that a German national, though holding sufficient property in California but

residing in Germany, would be subjected to the posting of security. The U.S. side countered that they were not familiar with the California practices and that security requirements varied among the States. They stressed, however, that it was out of the question for the U.S. Government to submit a treaty to the Senate containing a special privilege for foreign nationals not available in the U.S. in like situations to U.S. citizens.

The Germans commented that they had assumed the exemption to be applicable on the basis of the property test to their advantage. They held that acceptance of the U.S. proposed insert would result in unilateral disadvantages for Germany, since, in view of German past experiences based on the reciprocity clause of section 110 of the German Civil Code, only residence criteria were being followed in the United States. They were regretfully prepared, however, for political reasons, to support the U.S. suggestion before their superiors.

The U.S. side replied to this last remark by emphasizing that no special privileges or favors were being asked; and that the U.S. sought the provisions of a treaty of friendship on the theory that they were mutually

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beneficial. They remarked that their proposal would not become an unbalanced provision solely advantageous to the United States, and in support of this proposition briefly summarized the situation in the United States with respect to security for costs and judgment. In this connection, they stated that 53 independent jurisdictions existed of which some might

not give the desired benefits but some others might grant a better treatment to German nationals under the treaty than was accorded them at present. They referred to those States which under their laws required aliens to post security regardless of their residence or holding of property and stressed that the alienage test would be overcome by the treaty. They added that while perhaps exact reciprocity might not be achieved everywhere, in some States considerable advantage would result for Germans under the treaty. They noted that some States granted more with respect to security for costs and judgment to German nationals than U.S. citizens obtain in Germany, and argued that an overall balance would probably be achieved if all benefits and disadvantages were properly compared. They confirmed that the U.S. position was that a German holding property in a given State would be exempted from posting security for costs and judgment only if holding of property was likewise considered a reason for exemption for a U.S. national. They added that the procedural provisions of some States considered the holding of sufficient property reason for granting exemption from posting cash or a bond as security. In this connection, they stated that whether or not the holding of property was considered technically to be a ground for "exemption" from security might be a matter of definition of terms, for the provisional attachment of the property pending outcome of the litigation might of itself be regarded as a posting of security. The U.S. side handed the Germans, for their information a brief informal summary, prepared by Mr. Houston S. LAY, copy of which is enclosed.

The Germans requested the U.S. side to draft a counter-proposal to be discussed at the next meeting, and agreed in the interim to raise the principles with their superiors in order to obtain advance clearance.

Pauper's Right

A preliminary discussion was then held on the pauper's right.

The Germans proposed that consideration should be given to granting the pauper's right on the basis of reciprocity provided the national of the other Party was domiciled or had his permanent residence within the jurisdiction of the court.

The U.S. side asked whether the pauper's right would be granted in Germany to a destitute seaman who was not domiciled there, but merely a transient, yet wanted to go before a German court in order to recover wages or damages for injury suffered while in port. They commented that in the United States a seaman, irrespective of his nationality or domicile, would be granted the pauper's right in Federal courts if his suit pertained to his profession. They added that under the Jones Act seamen could take personal injury cases arising out of their employment into Federal courts;

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and that there was an exception in favor of seamen from the general Federal rule that suits in forma pauperis were restricted to citizens. With respect to State courts, they explained that the different laws varied. They stressed that the U.S. proposal would provide for national treatment in the pauper's right regardless of contrary Federal or State statutes; and thus would automatically establish the reciprocity required by German legislation.

The Germans commented that their final position regarding the granting of pauper's right for seamen would have to be reserved since it was a novel concept for them to have two courts apply different provisions, specific mention being made of the Federal district court of New York granting the pauper's

right to a seaman irrespective of the $3,000 limitation, whereas a New York State court might not grant this right. The German side continued that the pauper's right could not be considered in Germany under section 114 of the German Civil Code on a case by case reciprocity basis in contrast to the provisions applicable for the exemption from security for costs and judgment; and added that the pauper's right was not at present in general available to Americans since all cases involving litigation of an amount exceeding $3,000 could be transferred from the State to Federal courts where, except for seamen, U.S. nationality was a determining prerequisite, and the German authorities accordingly looked solely to the Federal rule in determining whether reciprocity existed. They explained that seamen presented a special situation, since seamen could bring cases involving payment for wages before a special labor tribunal where decisions were rendered free of charge. They noted that usually Union officials represented the plaintiffs before such labor courts and that lawyers were only admitted in cases where the value in dispute exceeded DM 600.

Both sides agreed to continue the discussion in the next Sub-Committee meeting scheduled to be held on March 9.

[Signed]
Carl H. Boehringer
Commercial Attache
Commercial Attache Division

Enclosure: [Initialled]

Informal summary

Coordination:

[Initialled]
Mr. Herman Walker, Jr.
OGC—Mr. S.H. Lay [Signed "S.H. Lay"]

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Costs; and Pleadings in Forma Pauperis

Statutes in the U.S. relating to security for costs vary as to particular types of pleadings and as to jurisdiction. Many pleadings in the Federal cou' s where jurisdiction is based on diversity of citizenship follow the rule of the State law, although at least one Federal District has its own rules on the subject. Wherever the subject matter is covered by Federal legislation such legislation, of course, prevails. A detailed analysis of the laws of each State and each Federal district would be too lengthy for our purposes and the most valuable explanation is a rather abbreviated statement of the more general practices.

In numerous instances, security for costs may be required regardless of citizenship, residence or property. In other cases, security may be required on the basis of residence outside the jurisdiction of the court regardless of citizenship, legal domicile or property location. In these jurisdictions an alien receives the same consideration as does a citizen. That is, if the alien is resident within the jurisdiction of the court, no security for cost is required. In other jurisdictions, the fact that a plaintiff is an alien is cause for demanding security for cost regardless of residence or property qualifications.

It would appear that in many jurisdictions, a corporation is assimilated to the status of a natural person although where there is a difference, it is usually in favor of requiring a corporation to give security for cost where a natural person would not be so required. Although there are many differences in the various U.S. jurisdictions on the question of security for cost, the Germans would acquire valuable rights under Article V and the protocol as proposed in the U.S. version of the FCN treaty.

State and Federal procedures in connection with pleadings in forma pauperis are equally divergent although here there appears to be a decided tendency to give the benefit only to citizens or residents and to exclude from the benefits aliens. In this connection, 28 USC, 1915 is of particular interest. In the Federal courts, citizenship is a basic qualification required to allow a plaintiff to commence a proceeding in forma pauperis.

Dr. Paulig had made reference to 28 USC, 32, (undoubtedly intended 28 USC 832) which has been incorporated into Section 1915. Under Section 1915, it is doubted that a corporation could qualify as a "citizen" to commence action in forma pauperis. 28 USC 1916 provides that seamen may commence action for their own benefits for wages or salvage or the enforcement of laws enacted for their safety, without prepaying fees or costs or furnishing security therefor. It does not appear that seamen need be citizens of the U.S. in order to take advantage of this section.

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Exhibit 11*

[First Copy of Page 1]

AIR POUCH Priority	UNCLASSIFIED (Security Classification)	DO NOT TYPE IN THIS SPACE 611/62a4/3-1854

[Comment: above nos. are handwritten; illegible handwritten initials appear on upper right; Department of State seal appears on right of page including "L/T Mar 31 1954, TREATY BRANCH, OFFICE OF THE LEGAL ADVISER".]

FOREIGN SERVICE DESPATCH

FROM: HICOG BONN [circled] Desp. No. 2529

TO: THE DEPARTMENT OF STATE, WASHINGTON Date March 18, 1954

REF: OURDES nos. 1355, October 28, 1953; 1372, October 30, 1953; and 2501, March 16, 1954

18 For Dept.	ACTION E-4	I DEPT. N Rep-2, DC-2, GER-4, OLI-6, L-2
Use Only	REC'D 3/26	F OTHER O CIA-5, COM-8, FCA-10, TR-3

[Comment: all entries in above grid are handwritten.]

SUBJECT: New Treaty of Friendship, Commerce, and Navigation: Report on March 16, 1954, Meeting with German Negotiators

* Comment: Two different copies of the first page of Exhibit 11 were furnished by the State Department. The second copy begins on page 184a, *infra*.

The 32nd regular business meeting for negotiation on the subject matter was held at the Foreign Office on March 16, 1954. Dr. BECKER, as usual, served as chairman of the German team which included representatives of the Foreign Office and the Ministries of Economics, Justice, Labor and Interior. The U.S. side included Messrs. BOEHRINGER, LEVY, and WALKER.

The meeting on March 16 was devoted to a detailed discussion of U.S. Article VIII on employment, professions, and non-profit activities, and U.S. Article IX on property rights.

Article VIII, Paragraph 1

The Germans stated that their preference remained to delete this paragraph, as being unnecessary, but that they were prepared to accommodate U.S. wishes for its retention in the treaty. They felt it to be in general acceptable as drafted, subject perhaps to linguistic clarifications and verification of their understanding of its intent. They had some questions to ask, in response to which the U.S. side developed answers as follows during the course of the discussion:

(1) The first sentence is of a general nature, being an elaboration of the principles of control and management set forth in Article VII, and is corollary thereto by emphasizing the freedom of management to make its own choices about personnel. Its major special purpose is to preclude the imposition of "percentile" legislation. [Comment: the foregoing sentence is underlined by hand]. It gives freedom of choice as among persons lawfully present in the country and occupationally qualified under the local law. The Germans said they might wish to suggest some linguistic revisions to clarify this last point. The U.S. side said they did not feel that further clarification was essential, especially as the juxtaposition of the contrasting wording of the first and second sentences gives clear clarification by implication; but declared their willingness to consider any reasonable proposal, in deference to German

views. No express clarification had been necessary in any other treaty, to the best recollection of the U.S. side.

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Exhibit 11

[Second Copy of Page 1]

AIR POUCH Priority	UNCLASSIFIED *(Security Classification)*	DO NOT TYPE IN THIS SPACE [handwritten nos. "611.62a/3-1854" appears in box.

FROM: HICOG BONN

2529
DESP. NO.

TO: THE DEPARTMENT OF STATE, WASHINGTON March 18, 1954
DATE

[Comment: Handwritten nos. with illegible writing appears under "TO" entry]

REF: OURDES nos. 1355, October 23, 1953; 1372, October 30, 1953; and 2501, March 16, 1954

18 For Dept. Use Only	ACTION E-4 REC'D 3/26	DEPT. I N REP-2, DE/R-2, GER-4, OLI-6, L-2 F OTHER O CIA-5, COM-8, FOA-10, TR-3

[Comment: all entries in above grid are handwritten.]

SUBJECT: New Treaty of Friendship, Commerce, and Navigation:
Report on March 16, 1954 Meeting with German Negotiators

[Comments: Illegible handwriting appears under SUBJECT entry; a stamp "This Document Must Be Returned To DC/R Central Files: 611.62A4/3-1854" appears on right margin.]

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(2) The second sentence deals with a special and limited situation, and within its framework goes beyond the first sentence, inasmuch as it waives professional qualification requirements in the cases stipulated. These have to do with temporary jobs requiring special skills (e.g., for an American firm, competence in American law and accounting methods) for internal management purposes; and no right is created to engage in the general practice of a profession in the host country. In reference to the question of entry into the country, necessary entry privileges are implied. With specific reference to the needs of a German firm in the United States, procedures are understood to be available whereunder temporary visas can be issued in properly justified cases.

(3) The word "moreover" introducing the second sentence is merely a convenient connective, and has no special substantive significance. The Germans said that it did not carry over very well into German; and it was agreed that it be translated as jedoch in the German text.

(4) It was agreed to frame the first sentence in a manner similar to that agreed on for Article VII, paragraph 1, to wit:

> "Nationals and companies of Germany shall be permitted to engage within the territories of the United States of America, and reciprocally nationals and companies of the United States of America shall be permitted to engage within the territories of Germany, accountants . . . . et cetera."

Article VIII, Paragraph 2

It was agreed, as in the case of the preceding paragraph, to reframe the first sentence along the following lines:

> "2. Nationals and companies of Germany shall be accorded within the territories of the United States of America, and reciprocally nationals and companies of the United States of America shall be accorded within the territories of Germany, national treatment and most-favored-nation treatment with respect to engaging in scientific, educational, religious and philanthropic activities, and shall be accorded the right to form associations for that purpose under the laws of the country. . . ."

Article IX

Dr. von SPRECKELSEN from the Justice Ministry, who acted as principal technical spokesman for the German side, commented that some legal difficulties had arisen which had not been considered during the earlier discussion of U.S. Article IX in October, 1953 (see reference despatches)

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which required additional explanation. He noted that these difficulties pertained to existing German legislation with respect to the acquisition of real property by alien natural persons and by alien juridical persons "residing abroad".

Acquisition of Realty in Germany by Alien Natural Persons

The German side noted that limited restrictions only were applicable regarding the acquisition of real property by alien natural persons and that these curtailments were based not on Federal but on old Laender legislation applicable in Hamburg, Hesse, and the part of the Rhineland-Palatinate which formerly belonged to Hesse.

They explained that in the above-cited Laender the acquisition of real property by alien natural persons depended on authorization granted by the Land authorities and that the purchase contract could not be fulfilled until the required authorization had been obtained. They noted that the date of the purchase contract became valid for the acquisition once the authorization had been accorded, but that the purchase contract was voided if the required authorization were denied. They added that the acquisition of real property by alien natural persons was subjected to such an authorization not only in cases of acquisition by contract but also in instances of acquisition by intestate or testate succession. They stressed that the existing provisions were being liberally applied, and that reciprocity treaties had been in the past concluded by Germany with other countries which waived the authorization require-

ment if likewise the countries concerned did not impose restrictions for the acquisition of real property by German nationals.

Acquisition of Realty by Alien Juridical Persons Residing Abroad

Dr. von Spreckelsen observed that for the acquisition of real property by alien juridical persons residing abroad practically all Laender required the granting of an authorization before a purchase contract became valid. He stated that the Laender applied the provisions on a liberal basis, and that old German treaties had renounced the application in case other countries had been prepared to grant reciprocity to German juridical entities.

He concluded that in view of these existing requirements it was difficult for the German side to accept paragraph 2 of U.S. Article IX, and asked whether the United States had ever granted natural and juridical alien persons in the United States national treatment as a treaty right.

The U.S. side reviewed U.S. treaty policy on this point and noted that only the 1853 treaty with Argentina provided for national treatment with respect to acquisition of title to real property, and then only in the case of natural persons. They added that the treaty with France

originally negotiated about 100 years ago had contained a similar provision but had been rejected by the Senate as

constituting undue interference in State rights; and that the policy of the Federal Government for years had been to abstain from interfering with State regulation of land ownership. They stated that the present text of paragraph 1, U.S. Article IX, which granted national treatment with respect to the leasing of land needed for treaty purposes without according a similar right for the holding of land by title, represented an internal U.S. compromise on the question of how far alien land tenure should be the subject of treaty commitments.

They stressed that the present text granted the greatest advantages for practical treaty purposes and added, with respect to clause 1 (b), that many States did not have discriminatory provisions in their legislation. In this connection, they noted that half the States had no disability laws, and perhaps 15—18 other States had variously slight or partial disability provisions, such as South Carolina and Pennsylvania which applied acreage limitations of a rather mild sort; Nebraska, which permitted full ownership inside municipalities but not in rural areas; and Wisconsin which prevented large scale holding of farmland by aliens by imposing acreage limitations in rural areas. They added that only seven or eight States had severe disability laws as to alien tenure. They concluded that, accordingly, an alien would for the most part be accorded either national treatment or very liberal treatment in the United States with respect to matters of treaty concern, and that the U.S. proposed language granted de facto reciprocity since any German Land could withhold rights to a U.S. natural or juridical person seated or domiciled in a State which imposed restrictions on Germans.

The U.S. side noted that the issue of property rights by treaty was sensitive in the United States; and also that the proposed text placed the responsibility for any right withheld from a U.S. national abroad on the States which maintained disability provisions in their law, and gave the legislatures concerned a practical occasion for reviewing the need for

maintaining disabilities which had been first adopted long ago when conditions were different.

As to the enforcement of alien disabilities in the States, they said that no known permit system had been established and that the disability clauses were typically latent legal provisions that allowed the alien to take title good as against all the world except the State itself. As a consequence, they stated, an alien could buy land, use it, and in the typical jurisdiction have this right challenged only by public authority through the writ of office found. They explained that this ancient writ was often subject to limitations; in Minnesota, for instance, if the Attorney General of the State did not challenge the alien's right within a specified number of years, the title became immune to challenge. They concluded that, although paragraph 1 contained a reservation, its effects were normally of small consequence since there existed a large degree of alien ownership either by virtue of liberal laws or practical toleration.

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The Germans countered that insofar as Germany was concerned sentence 2, paragraph 2 conveyed an apparent but not a real reciprocity since they had no federal law which afforded a possibility to prohibit U.S. nationals to own land. They added that the lack of comprehensive laws to apply the treaty provisions for natural persons as distinct from juridical persons, from whom restrictions existed in practically all Laender, would make paragraph 2 meaningless. Referring to paragraph 4, U.S. Article IX, they observed that under the German

license system the authorization, once granted, could not be revoked and that these considerations made it difficult for them to accept the U.S. formulation in paragraph 2.

The U.S. side answered that paragraph 4, U.S. Article IX, was a practical commitment to safeguard the alien against enforcement of the old common law theory under which he had no heritable blood, and its European counterpart the droit d'aubaine. They added that the five year period allowed the alien to sell his property at a full market price and thus protected him against spoliation or sacrifice sales. Regarding sentence 2 of paragraph 2, they stressed that it contained a latent reservation only, and that there was no problem in Germany since the treaty did not wish a country to worsen its laws but sought only to establish minimum rights. They explained that in accordance with its provision a Land could deny an authorization if similarly a State had a disability law and that on the other hand, a Land would grant the authorization automatically in case no State disability law existed. If a Land, however, did not in absence of the treaty impose an alien disability, the treaty most certainly would not in any way oblige it to change its system.

The German side countered that Article IX was the only Article in the present treaty with a marked and unbalanced reciprocity provision; and they suggested that paragraph 1 be redrafted in a mutual manner to parallel the other treaty provisions, and that paragraph 2 be deleted.

This German suggestion was followed by a further discussion of the merits of the U.S. proposal, which was answered by a German assertion that they feared that the U.S. draft might provoke political difficulties for the treaty. Its conspicuous difference from the way the treaty generally was set up would necessitate justifications in detail before parliament at the time of ratification; and they were not confident that they could give explanations that would readily allay suspicions in the Bundestag and Bundesrat. They feared that maintenance of the

U.S. proposed text might, therefore, prejudice early and harmonious ratification.

At this point, Dr. Becker being temporarily called from the room, the discussion digressed to the following three questions asked by Dr. von Spreckelsen:

(1) With respect to clause 1 (b) whether the words "other rights" included mortgages, or what, stressing that in Germany restrictions were applicable for only acquisition of real property.

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The U.S. side replied that a sure treaty right being only accorded under clause (a), the words "other rights" had been used on purpose to cover everything not in (a) falling within the scope of the concept "tenure of property".

(2) The second German question was whether it would be possible to stipulate sure treaty rights in those States whose laws made specific exception for treaty rights, specific mention being made of Missouri. In reply to that question, the U.S. side stated that, aside from the fact that the Missouri law, at one time at least, apparently pertained only to treaties existing at the time the law had been enacted, they felt the treaty had to be geared to the situation existing in the "hard core" group of States.

(3) The third German question pertained to the phrase "acquiring through judicial process" in paragraph 4. They

asked whether this phrase was designed to cover a change of ownership as a result of sale of property under execution in case a mortgage on such property had not been repaid. They further went on to say that in Germany alien and German alike would not become the owner of a property by mere purchase contract, but only after finalization by a contract of transfer (Auflassung). If a purchase contract was not fulfilled, suit could be brought against the seller. They asked whether such a law suit was also meant to be covered by the words "judicial process".

The U.S. side replied that if the reason for failure to fulfill the purchase contract was not due to interference by public authorities but solely based on willful and personal action of the seller, they did not see offhand the relevance of the latter question, though they would not hazard any final opinion. They suggested that Dr. von Spreckelsen was better qualified to analyze such a question; and they noted that their own legal counsel was unfortunately unable to attend today's session. They stated that though primarily the words "judicial process" had been motivated by a desire to cover mortgage foreclosures, wording had been chosen broad enough to cover other cases wherein a legal interest in property might be established by judgment of a court; for example, attachment in satisfaction of a debt other than a mortgage; enforcement of a dower right; or the property settlement growing out of a dissolution of marriage in a community property State. Dr. von Spreckelsen said that he would probably offer some language designed to clarify the term "judicial process", which was not a term that would be easily understood in Germany.

Conclusion

Dr. Becker reverted to his proposal that paragraph 1 be mutualized, and paragraph 2 deleted. He stated that he wanted to stress that notwithstanding the resultant narrowing of the scope of the treaty provision, U.S. citizens and companies could rest assured of being accorded liberal treatment in

Germany, in keeping with the basic purposes of the treaty to

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promote friendly intercourse and encourage broader business relations. He did not foresee that Americans would experience any difficulties in getting the property they might need in future.

It was finally agreed that the U.S. side would submit a redraft in compliance with Dr. Becker's proposal, and recommend it to the Department. The U.S. side stated, however, that they would be most happy to revert to the original U.S. proposal, if later after further consideration the Germans concluded that it would be feasible from the parliamentary viewpoint.

The redraft in question was prepared and handed to the Germans on March 17, copy enclosed.

[Signed]
Carl H. Boehringer
Commercial Attache
Commercial Attache Division

Enclosure:

[Initialled]

Suggested Redraft,
Article IX, paragraph 1

Coordination:

[Initialled]

Mr. Herman Walker, Jr.

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Amcongen Duesseldorf
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Page 1 of
Encl. No. 1
Desp. No. 2529
From HICOG BONN

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(Classification)

Page ___ of
Desp. No. _____
From _____

March 17, 1954

Suggested Redraft
ARTICLE IX, Paragraph 1

1. Nationals and companies of either Party shall be accorded within the territories of the other Party: (a) national treatment with respect to leasing land, buildings and other real property appropriate to the conduct of activities in which they are permitted to engage pursuant to Articles VII and VIII and for residential purposes, and with respect to occupying and using such property; and (b) other rights in real property permitted by the applicable laws of such other Party.

(Omit present paragraph 2, and renumber succeeding paragraphs)

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Exhibit 12

[Seal] [LETTERHEAD OF THE FOREIGN SERVICE OF THE UNITED STATES OF AMERICA]
Address official communications to
Office of the United States
High Commissioner for Germany
Office of Economic Affairs,
Commercial Attache Division,
Mehlemer Aue, Box 890,
Bad Godesberg
April 29, 1954.

The Honorable
The Secretary of State,
Washington, D.C.

Sir:

In connection with the negotiation of the new Treaty of Friendship, Commerce and Navigation between the United States of America and the Federal Republic of Germany, certain third person notes, containing information from the Department on specific articles of the United States standard draft treaty and of the German draft treaty, were sent by the office of the United States High Commissioner for Germany to the Ministry of Foreign Affairs, Bonn, during the course of the discussions which took place at Bonn. Following is a complete list of these notes, copies of which have been sent informally to the Department:

Date of Note	Subject Matter
November 2, 1953	U.S. Article IV
November 4, 1953 (1st note)	U.S. Article I
November 4, 1953 (2nd note)	U.S. Articles II & III
November 5, 1953	U.S. Article VI
November 12, 1953	U.S. Article II
November 23, 1953	U.S. Article V

December 9, 1953		U.S. Article VII
December 10, 1953		U.S. Article V
December 12, 1953		U.S. Article VI
December 14, 1953		U.S. Article IX
December 15, 1953		U.S. Article VIII
December 16, 1953	(1st note)	U.S. Article X
December 16, 1953	(2nd note)	German Articles 6, 7 & 8
February 5, 1954		U.S. Article III
February 8, 1954		U.S. Article II
February 9, 1954		U.S. Article XI

Respectfully yours,

[Signed]

Carl H. Boehringer
Commercial Attache

[Comments: Stamp "Filed May, 10 1954" on right side margin; stamp "611.62A4/4-2954" appears sideways on right of page; stamp "CJC" appears sideways on lower right of page; handwritten nos. "611.62a4/4-2954" appear sideways at bottom right of page; handwritten no. "62" appears on lower left of page.]

Note Dated November 2, 1953
(Ex. 12)

RESTRICTED

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

The Office of the United States High Commissioner for Germany presents its compliments to the Foreign Office of the Federal Republic of Germany, and has the honor to refer to discussions which took place on October 8, 1953, in the Foreign Office between representatives of the German and United States Governments regarding Article IV of the United States draft treaty on friendship, commerce and navigation.

It will be recalled that, inter alia, the German negotiators presented to the United States negotiators a revised version, in German and in English, of Article IV. The German negotiators also requested information regarding the meaning and intent of Article IV, as it appears in the U.S. draft treaty, and raised other points on which information was desired.

In accordance with instructions from the Department of State, this Office is now in position to transmit the Department's views with respect to the various points raised at the October 8 discussions.

Article IV has been drafted against the background of American law; in its present form it is calculated to assure German nationals effective rights in the United States as to the matters it covers. The Department desires, of course, that it also provide an assured base of equivalent rights for American nationals in Germany. Therefore, although the German counter-proposal for a revision of Article IV is not considered to be a satisfactory substitute for the Department's proposal, the Department concurs in the evident German purpose of arriving at language that will fit the Article adequately to the German social security system.

Speaking broadly, there are in the United States the following major categories of what may for present purposes be called "so-

cial security" systems: (1) workmen's compensation; (2) local welfare and relief programs; (3) federal old age and survivors insurance; (4) federal-State unemployment compensation; and (5) federally-aided State programs of public assistance to needy who are aged, blind, or permanently and totally disabled, and for dependent children. The

Department's

[End of page]

RESTRICTED -2-

Department's proposal as set forth in Article IV, deal with (1), (3) and (4), and represent the extent to which the United States is now prepared to enter treaty commitments. The United States Government has not been prepared to enter treaty commitments with respect to (2) and (5), since it has been deemed expedient to leave these two categories under State and local jurisdiction without interference from treaties negotiated by the federal government.

Paragraph 1 of Article IV deals with category (1); and paragraph 2 deals with categories (3) and (4). There is no overlap; the two subject matters are quite distinct. The first is a matter regulated by the States. It deals with the rights of a workman and his family to compensation for bodily damage suffered at work or in consequence of his work—the award of compensation being made according to a fixed scale of payments through an administrative procedure designed to save the injured party the hazards, delays and expense of litigation and to preclude the common-law defenses of contributory negligence, assumption of risk and fellow-servant rule traditionally available to the employer in a suit of law. Article II of the 1923 Treaty of Friendship, Commerce and Consular Rights between the United States and Germany, which in turn elaborated on a provision negotiated with Italy in 1913, inaugurated the United States treaty policy with respect to this matter. The present wording is designed to clarify certain ambiguities in the 1923 wording as respects workmen's compensation, and to take account of experience gained in the

field since that date when the subject was still a fairly novel one in the United States.

On the other hand, paragraph 2, which first appeared in the 1948 Treaty of Friendship, Commerce and Navigation between the United States and Italy, deals with the largely federalized social security system proper. This is a compulsory insurance system, financed on a contributory basis. As the law now stands, the system extends to old-age and survivors benefits, and to unemployment compensation. Clause (a) of U.S. standard draft, however, is so worded that the treaty would also apply to sickness and disability benefits should the law in future be expanded to cover those features. With respect to the question raised by the German negotiators regarding this paragraph, the reference to "test of financial need" is designed to make clear that the system visualized is a true insurance system, whereunder payments are made to the recipient as of right and without regard to his financial circumstances, as distinguished from a relief system whereunder the recipient is given something as an act of charity in accordance with his need (i.e., a "means test" is applied).

The Department supports the position taken by the American negotiators to the effect that generic language sufficiently broad to insure

[End of page]

to insure the treaty's adaptability to future changes in the details of legislation is eminently desirable in a broad-gauge instrument of this type which is designed to endure for an indefinite period and which should preferably deal in terms of general principle. At the same time, the Department observes that the language should be sufficiently specific that all interested parties, including municipal bodies where involved, can ascertain their major rights and obligations under the treaty. One of the reasons for revising the 1923 provision in reference to workmen's compensation was, indeed, to find language that would readily apprise

interested State officials of what was expected of them under the treaty.

It may be noted, further, that in contrast to the German counterdraft (last clause, paragraph 2), the U.S. draft does not subject the national treatment principle to any residence or domicile qualification. The intent is not to rule out the possibility of residence or domicile tests, but to assure that any such tests, where they exist, shall be imposed in the same manner upon the citizen and the treaty alien alike, to the end that there be fully equal treatment in equal circumstances.

The Department concludes that, pending further exploration in light of German legislation and of the reasons underlying the U.S. draft, there does not appear to be anything more of consequence which it can usefully add at this time, except to observe that Article IV is not an indispensable element of the treaty's major objectives, from the U.S. viewpoint. It has been developed in large part in deference to the wishes of other countries, and, as a practical matter, redounds on balance more to the advantage of aliens in the United States than of Americans abroad. It has been retained in the U.S. standard draft in the interests of uniformity of approach, and of having a well-rounded document concerned with all elements of the population.

Copy to:

EU:GER:GEA
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OGC—Mr. H. S. Lay
E:FNP

U.S. High Commissioner for Germany
Bonn, November 2, 1953

CHBoehringer/gl November 2, 1953 (Original initialed CHB)

First Noted Dated November 4, 1953
(Ex. 12)

RESTRICTED

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

The Office of the United States High Commissioner for Germany presents its compliments to the Foreign Office of the Federal Republic of Germany, and has the honor to refer to its note of November 2, 1953, containing comment from the Department of State regarding Article IV of the Department's standard draft treaty of friendship, commerce and navigation.

This Office is now in receipt of further communications from the Department which contain comment on various points raised in the discussions between the German and American negotiators on October 5, 1953.

With reference to the question regarding the present sovereignty status of Germany in relation to the treaty, which was raised by the German negotiators, the Department is inclined to believe that there would be occasion for special clarifying provisions only if, and to the extent that, the German Government would, under the existing and the EDC regime, have difficulty in complying with one or more of the specific commitments agreed to in the treaty, or if some particular provision (e.g., Article XXIII on territorial application) is not adequately phrased from the viewpoint of Germany's situation. That is, determination of the answer to the question raised by the German negotiators would appear to depend on whether specific elements in the content or wording of the treaty creates special problems for Germany. The Department does not, at this early stage of the proceedings, envisage such problems. However, the German negotiators are invited to cite and define any that they may detect as the detailed examination of the treaty proceeds.

Regarding the discussions on Article I, it will be recalled that the German negotiators advanced the thought that this Article is

designed to have declaratory value and to set forth the major principles and objectives of the remaining part of the treaty. In the Department's opinion, this supposition is partially correct, for the Article is in part calculated to form a link between the preamble and the main body of the treaty and as such to emphasize the broad scope of the treaty and to characterize in summary language the purpose of fair dealing underlying its more detailed provisions. It has also, however, two other interrelated objectives,

namely:

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namely: (1) to suggest a general policy of liberal, rather than of narrow, construction of the provisions of the treaty; and (2) to afford a guiding principle to which resort may be had in situations where no specific rule of the treaty is applicable or in reference to which the specific rules of the treaty do not provide an adequate standard of treatment. (For example, a given governmental measure may technically comply with the legal rule of national treatment, yet be so arbitrary and so burdensome in its impact on the foreigner as to be grossly unjust. A process of superficially objective "classification" is one device available, in certain situations, for singling out the foreigner for harrassment without breaching the letter of the national treatment rule.) The latter objective constitutes perhaps the major justification for the Article.

The Department, in choosing the words "persons, property, enterprises and other interests of nationals and companies", had in mind broad coverage encompassing the entire range of the treaty, for it is not believed that there is any topic alluded to in the treaty which is not referrable to one or more of the words of this recitation, liberally construed. In this connection, this Office has been instructed to inform the German negotiators that, should they feel that this recitation is not as adequate as it might be, the

Department would be glad to consider any revisions they may wish to suggest, so long as the wording remains general and brief.

The German proposal to insert the words "fair and" before "equitable", so that in translation the phrase would read "gerechte und billige", is acceptable to the Department.

The Department is inclined to doubt the desirability of adding a paragraph concerning the specifically "friendship" aspects of the treaty. The Department has not in its post-war treaty program followed a policy of including such a paragraph. While there are two exceptions, to be found respectively in the treaties with China (1946) and Ethiopia (1951), in these cases there existed special considerations not believed applicable in the case of Germany or of European countries generally. The discussions with China commenced while the war in which the two countries were allied was still in progress; and, moreover, such a paragraph reflected a rather traditional idea in treaty relations with China, the omission of which might have been taken amiss at the time. In the case of Ethiopia, the instrument negotiated was not a standard FCN treaty, but a specially abridged and adapted version broadened in scope to include material on diplomatic and consular relations, and formulated with regard to circumstances and past experience peculiar to Ehtiopia. [sic]

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The Department's theory has been that the friendship in the treaty consists in the fact that the two countries undertake to enter into such a broad-gauge and liberal charter of relations, which betokens good neighborliness of a high order and which necessarily implies mutual sentiments of cordiality; and that any express references to friendship might most appropriately be the concern of the preamble. The word "Friendship" in the treaty's title is retained for traditional reasons, as the trilogy "friendship-commerce-navigation" is consecrated by usage in connection

with this sort of instrument. Except for this traditional association, the word "friendship" might be construed to carry overtones of military and political alliance outside the intent and purpose of the treaty, an essentially economic document which might more accurately be described as a treaty of "establishment, investment, commerce and navigation". One of the reasons for avoiding specific provisions on "friendship", therefore, has been to obviate misinterpretations of the purpose and nature of the instrument. Another reason has been that a paragraph on "friendship", being merely hortatory and sentimental in character, would appear to be out of keeping with the principle that the numbered provisions of the body of the treaty should insofar as possible lay down rules of law, that is, specific standards capable of affording definite guides to behavior in concrete situations.

If it is found inappropriate to add a "friendship" paragraph, there would, in the Department's opinion, hardly appear great need for the suggested third paragraph on freedom of commerce and navigation, as proposed by the German negotiators, insofar as the suggestion has been motivated by a desire to achieve balance in form. The Department is inclined to believe, indeed, that a two-paragraph article in the form suggested would be asymmetrical. Apart from considerations of form, however, the Department perceives a possible serious objection of substance to this suggestion. In the standard U.S. draft, a provision on freedom of commerce and navigation introduces the treaty's provisions on shipping (Article XIX), its traditional association, and it is consequently presumed to have its significance in connection with the ship traffic. If this provision were transposed to the head of the treaty, so as to preface all that follows (including Article XIV), it would appear, inter alia, to imply "free trade" commitments with reference to the international goods traffic beyond what the United States (and perhaps Germany also) is prepared to undertake. While, therefore, the Department does not wish to assume the arbitrary posture of denying that there is any way in which Article I can be acceptably expanded, the particular suggestion advanced by the German negotiators does not appear to be feasible. The possibil-

ity exists, of course, that the German negotiators may wish to formulate alternative suggestions for consideration.

Additional

[End of page]

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Additional comment on other points raised at the October 5, 1953 meeting will be given in supplementary notes from this Office.

U.S. High Commissioner for Germany

Bonn, [Comment: "December 16" crossed out and handwritten "November 4" inserted] 1953

Copy to:
EU:GER:GEA
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OGC—Mr. H.S. Lay
E:FNP

E:CAD:CHBoehringer:maa
Tel. Mehlem 3265/66 (Original initialed CHB)

Second Note Dated November 4, 1953
(Ex. 12)

RESTRICTED

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

The Office of the United States High Commissioner for Germany presents its compliments to the Foreign Office of the Federal Republic of Germany, and has the honor to refer to its first note of November 4, 1953, containing comment from the Department of State regarding various points raised in the discussions held on October 5, 1953, between representatives of the German and United States Governments, in connection with the proposed treaty of friendship, commerce and navigation between the two countries.

This Office is now in position to make available to the Foreign Office the Department's views regarding the exchange of views which took place with respect to Article II of the U.S. standard draft.

With regard to the question raised by the German negotiators about "a substantial amount of capital", as used in Article II(1)(b) of the standard draft, the Department states that this term has yet to be authoritatively interpreted. As the treaty investor clause is an innovation and no cases have arisen under it, there is no body of precedent which can be drawn upon for this purpose. In common with the rest of the clause, determination of the exact scope of the term in all situations must wait until a body of experience has built up through interpreting and applying it in specific cases from time to time in the future.

However, some concept of the intended meaning of the term may be derived from the origin and objectives of the treaty investor clause as a whole. The clause initially was proposed with the view of encouraging the international flow of investment capital. Specifically, the intent was to further this objective by facilitating through treaties the entry and indefinite sojourn of persons who wish to engage in worthwhile investment activities in the United

States but were eligible only for temporary business visitor's visas because their activities did not constitute international trade within the meaning of clause (a), relating to treaty traders. In developing the investor clause and obtaining its acceptance by the appropriate Congressional bodies, particular attention was given to assuring that the clause, if enacted into law, would not become a device to

permit

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permit individual aliens to circumvent other provisions of the immigration laws. The concern was basically that the investment on which the granting of treaty investor status was based would be genuine and significant. Possibilities of abuse were foreseen through fictitious or dummy operations, small individual investments (e.g., in over-crowded segments of the petty retail trade) cloaking an attempt to evade the quota, and speculative ventures undertaken as a pretext for obtaining entry for other purposes.

So far as the Department is aware, the specification by Congress of criteria for eligibility to treaty status was influenced mainly and perhaps exclusively by considerations of preventing abuse or evasion of the immigration laws. Substantiality of investment may be viewed in light of this aim; and similarly such corollary tests as the actuality, and the enduring character of the investment. So far as is known to the Department, Congress did not frame the treaty investor section of the Immigration and Nationality Act with the intention of discouraging particular types of investment or of excluding small investments. What constitutes a substantial investment is a relative matter, depending upon the pattern of investment, the prevailing type of organization and other conditions within the industry in which the individual investment is to be made. One factor would be whether the size and character of the individual investment are such as reasonably to require the immediate personal attention of the owner

or controller. Size alone, measured in monetary terms, would not necessarily be the decisive factor. A relatively small commitment in terms of dollars might constitute a substantial investment if made in an enterprise engaged in certain technical processes serving a limited market, and where the ratio of necessary technology and skill to capital is high, as, for example, the grinding of special types of optical lenses or the cutting of diamonds. On the other hand, the substantiality of an investment consisting solely of an inconsequential fractional interest in a large and heavily capitalized enterprise would obviously be open to question under clause (b). Similarly, the investment of a small sum in a common small-scale occupation (e.g., a corner grocery store, gasoline filling station, or a one-man farm) suggests that the prospective "investor" be considered ineligible under clause (b), as he properly should be seeking entry as an immigrant under the quota.

Regarding Article II in the U.S. standard draft, the scheme advanced by the German negotiators that the "cultural" parts of the treaty, as they may be found from time to time in the draft, be segregated and dealt with in separate articles is, according to the Department, not unprecedented or on its face illogical. However, if extensively carried out, it bids to run into complications and could materially increase the wordage of the document needlessly.

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RESTRICTED -3-

The introduction of religious, scientific and educational activities at this point, in accordance with the German proposal for reorganizing paragraph 2 of the Department's draft, illustrates this. The endeavor to provide full coverage for these activities at this point leads logically to providing for property rights in connection with them. But a rule on property cannot, from the United States viewpoint, be so summarily written as in the German counterdraft. Property is a special subject requiring some

space to deal with properly, in view of the U.S. federal system. It has therefore been found convenient and economical to gather all the material on property into one Article (IX). Thereby, lengthy repetitions are avoided. Again, if a full treatment of these activities is to be undertaken at this point, the question of taxation in reference to such activities would need to be gone into, in addition to the question of property rights. But here also is a question needing some space to treat adequately; and it has proved most convenient and economical to deal with general taxation also in a single Article (XI). Yet again, if activities are to be dealt with fully, there arises the question of the rights to conduct such activities through the medium of corporations and associations, as well as individually. But to provide at this point for this and other pertinent details tends to break the pace of the treaty. Finally, the logical reason for associating "scientific" activities with freedom of worship, in the same paragraph, is not readily perceived; but if scientific activities are not included along with religious, still additional provisions would have to be formulated to achieve the treaty coverage sought.

Altogether, the Department believes that the orderly and efficient approach is to defer the question of "activities" (including "philanthropic" activities, which the Department notes was omitted without explanation in the German counterdraft) until after the matters covered in Articles II through VI of the U.S. draft (being primarily certain basic rights of persons and property), are disposed of.

At this juncture, it might be useful to note the distinction between freedom of conscience and worship, on the one hand, and "religious activities" on the other, as the Department visualizes it. The former concerns the right of the nationals of the one party in the other to believe and practice their own chosen religion, individually and among themselves. The latter encompasses their right to do things that carry them outside the circle of the host country. The former is a fundamental human freedom which should not be subject to any national treatment or most-favored-nation treatment qualification, because so to do would be to rec-

ognize that the treaty alien's individual liberty of conscience, and the manifestation thereof in religious services within the alien community, are

in principle

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in principle subject to repression if the Government chooses to direct and circumscribe the religious beliefs and practices of its own citizens. The qualification to which this freedom may properly be subject is that it be not disorderly, unsanitary or immoral in its practice. The right to engage in religious "activities", however, may properly be framed in a national and most-favored-nation treatment context, which of course obviates the need for any special qualifications as to public health, morals or safety. The two subject matters are therefore separated in the U.S. draft, the former being framed in absolute terms in Article II(2) subject only to the reservations in paragraph 3 of that Article, and the latter being treated in contingent terms in the last paragraph of Article VIII in association with provisions dealing with other types of activities and the ancillary rules applicable thereto.

If "activities" are deleted, the task of adopting the organization suggested by the German negotiators in reference to Article II of the U.S. draft would be greatly eased; and if they wish to revise their counterproposal in light of the relevant Department comments, the Department would be pleased to give it careful consideration. In this connection, reference may be made to the treaty which the United States recently concluded with Greece, in which Article II (except paragraph 2) and III afford an illustration of a comparable approach in another case).

It should be pointed out, by way of concluding comment, that the Department feels the specific material on freedom of communication and reporting (sub-paragraphs (d) and (e) of the U.S. draft) to be a highly desirable part of the treaty, and that the supposed reference by implication to this subject matter in the

second sentence of II(1) of the German counterdraft represents a quite inadequate way of dealing with it.

With regard to Article III of the U.S. draft, it will be recalled that the German negotiators suggested one change and that in paragraph 2, whereby the first sentence thereof would be modified as follows:

> "If, within the territories of either Party, a national of the other Party is taken into custody, the nearest consular representatives of his country shall be immediately notified unless the person taken into custody objects thereto."

The Department has instructed this Office that it is unable to accept the change made by the German negotiators, because the United States Government cannot confidently undertake that State and local police officials in the United States will automatically notify the appropriate consul when there is an arrest or detention. The

objection

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RESTRICTED -5-

objection is a practical one, growing out of the fact that law enforcement in the United States is largely in the hands of county sheriffs, municipal police forces, and State constabularies, in literally thousands of different jurisdictions; and there is no machinery or procedure whereby the federal government can effectively issue them instructions. If local officials are aware that they have a legal duty to give such notification, they may be counted on to do so. But the only practicable way the Department has been able to devise for assuring that the necessary knowledge is had by the official needing it, when he needs it, is that set forth in the U.S. standard draft; namely, that the arrested person assume the burden of demanding notification.

For the rest, the idea that an arrested person should enjoy a treaty right to have his consul kept in ignorance seems, in the Department's opinion, to be rather novel. Should the German negotiators wish to support their proposal in this regard, the Department has expressed interest in receiving from this Office a statement containing reasons additional to those expressed by them during the October 5 meeting.

The foregoing concludes the comments from the Department which this Office is presently in position to transmit to the Foreign Office with respect to the matters discussed on October 5, 1953.

Copy to:
EU:GER:GEA
E:OD
PA:OD
OGC—Mr. H. S. Lay
E:FNP

U.S. High Commissioner for Germany
Bonn, November 4, 1953

CHBoehringer/gl
November 4, 1953 (Original initialed CHB)

Note Dated November 5, 1953
(Ex. 12)

RESTRICTED

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

The Office of the United States High Commissioner for Germany presents its compliments to the Foreign Office of the Federal Republic of Germany, and has the honor to refer to its two notes of November 4, 1953, containing comment from the Department of State regarding various points raised in the current discussions regarding a new treaty of friendship, commerce and navigation between the United States and Germany.

This Office is now in receipt of a communication from the Department, containing comment on the exchange of views held on October 8, 1953, between the German and American negotiators with respect to Article VI regarding protection of property.

The insertion of the phrase "and in accordance with due process of law" after the words "public purpose" in paragraph 4, as suggested by the German negotiators, is acceptable to the Department.

The Department does not, however, look with favor upon the suggested additional paragraph relative to the requisitioning of vessels. In principle the Department believes that a treaty should not attempt to prohibit either Government from taking for paramount reasons private property it may deem necessary in whatever needful contingencies may materialize. To write in such prohibitions would, in the Department's opinion, infringe more on the prerogatives of sovereignty than the treaty ought to attempt, and introduce a futile element of rigidity into an instrument that ought to be sufficiently flexible to permit it to endure in full force and effect over a long period of time. The treaty provisions on the taking of property might most prudently be confined to basic rules that prescribe how the Government goes about a taking.

Specifically, as to the particular case of vessels, the Department would not see advantage in a provision which implied impropriety in the ship seizure policy which the United States or its allies followed in the World War II period; or which purported to commit the United States not to seize ships deemed vitally necessary to its

essential

[End of page]

essential security in a future war emergency. In such a contingency, in fact, the existence in the treaty of the security reservation (Article XXI, paragraph 1-d) would render the proposed paragraph ineffectual.

The foregoing would appear to conclude the Department's expression of views on matters discussed during the October 8 meeting, specific comment on Article IV of the U.S. standard draft treaty having been communicated to the Foreign Office by means of a note from this Office dated November 2, 1953.

U.S. High Commissioner for Germany,
Bonn, November 5, 1953

Copies to:
EU:GER:GEA
E:OD
PA:OD
OGC—Mr. S. H. Lay
E:FNP

CHBoehringer/gl Nov. 5, 1953 (Original initialed CHB)

Noted Dated November 12, 1953
(Ex. 12)

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THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

The Office of the United States High Commissioner for Germany presents its compliments to the Federal Ministry of Foreign Affairs, and has the honor to refer to its note of November 5, 1953, and previous notes, containing comment from the Department of State regarding various points raised in the current discussions regarding a new treaty of friendship, commerce and navigation between the United States and Germany.

This Office is now in receipt of a further communication from the Department of State which contains comment on Article II of the United States standard draft additional to the comment contained in this Office's second of two notes of November 4, 1953.

The Department of State observes that the German counterproposal regarding entry and immigration rights goes much beyond any thing the United States Government can entertain, as it poses serious conflict with the Immigration and Nationality Act which the Department of State is bound scrupulously to observe. The standard draft provision proposed by the Department of State has
been framed in conformity with the provisions of that Act, and indicate the limits within which the United States Government is prepared to undertake treaty commitments.

Assured rights of entry and sojourn are proposed in paragraph 1, clauses (a) and (b) respectively, for two classes of persons: namely, the "treaty trader" (for whom provision was made also in previous immigration legislation) and the "treaty investor" (for whom provision was made for the first time in the Immigration and Nationality Act that went into force on December 24, 1952). Persons eligible according to the criteria which determine who are genuine traders or investors within the meaning of the treaty, and who are individually admissible,

are exempt from the quota system and may remain indefinitely in the country so long as they maintain their good standing and status. As regards persons desiring to enter the United States for other reasons, the wording of clause (c) reserves the applicable limitations and requirements of the laws and regulations (quota system for "immigrants" on national origin basis, length of permissible stay for non-immigrants, et cetera). Clauses (a), (b) and (c), being set off

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by semi-colons, are each self-contained. But paragraph 3 is designed, inter alia, to make clear that individuals desiring to enter under clauses (a) and (b) are subject to exclusion or expulsion as personally undesirable on the various grounds set for in the law.

The Department of State has indicated that it will expect to make additional comment on other points raised during the October 5, 1953 meeting of the German and American negotiators.

Copy to:
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U.S. High Commissioner for Germany
Bonn, November 12, 1953

CHBoehringer/gl
Nov. 12, 1953

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Note Dated November 23, 1953
(Ex. 12)

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THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

The Office of the United States High Commissioner for Germany presents its compliments to the Federal Ministry of Foreign Affairs, and has the honor to refer to its note of November 12, 1953, and previous notes, containing comment from the Department of State regarding various points raised in the current discussions with respect to a new treaty of friendship, commerce and navigation between the United States and Germany.

The Office is now in receipt of a communication from the Department of State which contains comment on Article V of the United States standard draft regarding judicial rights and commercial arbitration. A discussion on this Article took place in the Ministry of Foreign Affairs on October 22, 1953.

With respect to the first sentence of paragraph 1, it will be recalled that the German negotiators asked whether the two forms of jurisdiction in Germany, namely, non-contentious jurisdiction (freiwillige Gerichtsbarkeit) and contentious jurisdiction (streitige Gerichtsbarkeit), were understood to be included thereunder. The answer to this question is in the affirmative, it being contained in the phrase "in all degrees of jurisdiction".

Again referring to the first sentence of paragraph 1, the German negotiators suggested that the words "in pursuit and in defense" be amended to read "in pursuit, in defense and in protection". Although the German negotiators subsequently agreed to withdraw their suggestion, following comment by the American negotiators, it is believed the former will be interested in the Department of State's views on this point.

The Department of State notes that if the precise words "in pursuit and in defense" used in the English-language version of the draft do not in German convey the notion that

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American citizens should be entitled to national treatment in all material aspects before the German courts, there may exist a small problem of effective translation. Accordingly, this Office has been requested to inquire whether it might not be appropriate to translate the words "in pursuit, in defense and in protection" in the German language version of the treaty, leaving the words stand as at present in the English version inasmuch as they are suitably adjusted to American usage and the business of American courts. This would be preferable, in the opinion of the Department of State, in correct treaty usage, to the informal understanding technique, if it is really the case that the phrase "in pursuit and in defense" does not come out with the full meaning in German. That is, the treaty's wording should on its face indicate the fullness of its meaning in an equivalent way in both languages, to the extent feasible.

With regard to the clarification of the point that Article V is not calculated to give a right to German nationals to contest or reopen vesting orders, as noted by the American negotiators, the Department of State recalls that the same question arose in connection with the agreement signed at Bonn on June 3, 1953, providing for reactivation of the 1923 Treaty of Friendship, Commerce and Consular Rights between Germany and the United States, and it was finally concluded that no special provision was necessary. If it transpires that a different conclusion is in order for the present treaty, for some reason not now readily apparent, the Department of State would of course want to see an appropriate proviso drafted and agreed to. As a general proposition, the Department of State is prepared to consider whatever special adjustments may be necessary to fit the treaty to special problems growing out of the War, the occupation and Germany's present status. However, the supposition of the Department of State is that the formulation of appropriate adjusting language should be deferred until all the problems are identified and delineated, in the hope that no more than a single well-turned provision, placed perhaps in the

protocol, will prove necessary (aside, perhaps, from some such questions as territorial applicability which if necessary may more expediently be handled separately). In the case of the FCN treaty between the United States and Japan, it transpired that no special provision was necessary; and in the case of the June 3, 1953 agreement referred to above a single paragraph (Article III) accomplished what was pertinent and proper for Germany in the circumstances.

With regard

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With regard to the German proposal to eliminate the provision for most-favored-nation treatment contained in the first sentence of paragraph 1, the Department of State indicates that it would not attach major importance to retaining the most-favored-nation clause in this paragraph, as the national treatment clause appears to afford an adequate measure of protection in the context. This Office has therefore been authorized to agree to the German suggestion to delete the most-favored-nation reference, provided the German negotiators continue to feel rather positively that it serves no useful purpose and would be better satisfied with it out.

It may be worth observing at this juncture, however, that the Department of State is decidedly interested in the precedent value of a United States-German treaty. Countries in other parts of the world often look to the United States and Western Europe to set the pattern and the norm in treaty relations. A particular wording or provision may have its chief immediate value, therefore, not so much because it plays at the moment an essential role in the bilateral relations of countries in the North Atlantic community, but because unless the latter are prepared to subscribe to it in treaties among themselves other countries where it is needed for demonstrably practical reasons may be disposed to resist it on the ground that it implies singling them out for unusual and suspicious demands. In the

opinion of the Department of State, Germany has an interest, as well as the United States, in establishing the rule of law and of decent treatment for the alien and his property throughout the world; and thus she presumably shares the United States interest in achieving a bilateral treaty which can be held up as a model of enlightenment for others to follow.

The Department of State adds that it has sought to draft a treaty which incorporates sound principle and equity, good generally for countries great and small, weak or powerful, in all parts of the world—something which it can in good conscience propose equally and indiscriminately to most countries everywhere. It is believed that this is the most efficacious approach to realizing not only the immediate objective of protection for American interests on a bilateral basis but also the remoter objective of building toward an internationally accepted standard of treatment for the alien. These treaties are entirely mutual and the United States is asking no commitment that it is not willing itself to undertake.

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Regarding the discussion on paragraph 1 of the protocol, the Department of State notes that in using the term "legal aid", it had in mind the full area of matter apparently covered by the three German concepts of Rechtsbeistand, Armenrecht and Pflichtverteidigung. The translation of Rechtsbeistand for "legal aid" appears, in the opinion of the Department of State, to be inadequate. In the opinion of this Office, the word Rechtshilfe would appear to be appropriate in this case.

In general, the approach of the Department of State on this point is that special residence qualifications should not be attached to the national treatment rule. The view is that residence qualifications should be allowable, provided always that any residence test that may be adopted is applied equally

to the citizen and the alien. If the state, for a reason of public policy, which it deems controlling, wishes to withhold some privilege from non-resident citizens, it would not seem inappropriate for non-resident aliens to be denied the like privilege, for the test would presumably be motivated by objective rather than subjective considerations. Such residence requirements as may be found in State laws, in connection with legal aid, should not be attributed an exaggerated significance; and the Department of State is inclined to question whether there is actually a persuasive reason for reserving the "pauper's right" from the coverage of the treaty.

With respect to the discussion of the term "security for costs and judgment" in numbered paragraph 1 of the protocol, the Department of State indicates that, although it is not altogether certain that it fully comprehends the precise issue raised in this regard, its analysis tends to the conclusion that such issue as may exist is probably narrower than would at first glance appear. Under the treaty rule, there could be no alienage test in the security requirements imposed by the courts of either country. But courts in the United States and in Germany would remain free to impose objective requirements such as residence or presence of property within the jurisdiction, so long as imposed equally upon the citizen and the treaty alien. In the United States, it is understood that there tend to be less posting-of-security requirements than is common in Europe; and the requirements that are imposed are not in alienage terms, but in terms of non-residence or lack

of sufficient

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of sufficient assets within the jurisdiction. Without a complete State-by-State tabulation, the Department of State cannot say that a resident German national without property in the jurisdiction would necessarily be exempt from such requirements;

but it can assert that, with the treaty in force, no resident German would be subject to treatment less favorable than that granted a similarly resident citizen in a like property status. The Department of State concludes that perhaps this will be considered to satisfy the reciprocity feature of the German system.

As to the question of a guarantee by the United States for the collection of the costs of a German judgment given execution in the United States, the Department of State offers the following comment. Foreign judgments are not given automatic execution in the United States. This is so whether the judgment is foreign in the sense of being that of another State of the Union or in the sense of being that of a foreign country. Because the enforcement of foreign judgments thus touches upon delicate questions of inter-State relations within the Federal system, as well as upon the powers of a constitutionally independent judiciary, the policy of the Department of State has been to refrain from attempting treaty commitments in the matter.

A party-in-interest wishing to secure execution must file suit in an appropriate court for a judgment to enforce the foreign judgment. If the court deems that the foreign judgment should not for good and sufficient reason be disapproved, the petitioning party gets a domestic judgment which has all the usual rights of compulsory process for execution of the judgment and collecting the costs taxed. The purpose of the suit is to give the court opportunity to ascertain the validity of the foreign judgment and to satisfy itself that its enforcement would be consistent with the public policy of the jurisdiction where enforcement is sought; and if so satisfied the court will hand down the appropriate decision to bring about the enforcement. The situation is summarized in 50 C.J.S. (Corpus Juris Secundum) 540 as follows: "Except where they are contrary to public policy, valid judgments of the courts of foreign countries generally are recognized and given effect in state and federal courts". The basis is comity, which may or may not be deemed to require reciprocity in the case of judgments inpersonam, depending on the jurisdiction. (For example, in New York "a

foreign judgment may be recognized and enforced without regard to reciprocity", 50. C.J.S. 543).

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One of the items a court may wish to review is whether the costs allowed by the foreign court are excessive; and it may wish to scale down or disallow costs which it deems unreasonable. The situation with respect to recovery of costs is summarized in 50 C.J.S. 467-8 as follows: "In an action on a foreign judgment, plaintiff, if successful, is entitled to recover the amount which is presently due on such judgment . . . The recovery may include the costs of the foreign action if they constitute a part of the foreign judgment; but where the record or the transcript of the judgment contains no statement as to costs, or as to the amount thereof, costs cannot be recovered, in absence of proof thereof, and it has been held that an allowance in the new judgment for costs in the original action has been held error. Costs may be allowed in the action on the foreign judgment. The allowance of counsel fees has been held improper." (The citations given are often cases involving the enforcement in one State of judgments given in other States). While, therefore, the United States is not believed to be in the category of a country which refuses to assume an obligation regarding collection of costs, on the other hand the United States Government is not in position to undertake a definite commitment either that all foreign judgments will be enforced or that all costs will be accorded compulsory execution. With respect to affording compulsory process to secure collection of allowable costs, in connection with an enforceable foreign judgment, the Department of State presumes that reciprocity could be considered to exist between the United States and Germany; but if "reciprocity" were defined to imply that United States courts were compelled, without discretion, to

allow all costs assessed by a German court in all circumstances, the reciprocity suggested by the German negotiators could not be said to exist. If the latter is the case, the particular solution proposed by the German negotiators would not prove feasible.

With regard to the discussion on paragraph 2 of Article V, which deals with arbitration of controversies, the Department of State indicates that it would be prepared to agree to substitute the formula, in toto, adopted in the FCN treaties which the United States recently concluded with Japan and with Greece. That formula has perhaps the advantage of setting forth the objective in more affirmative and quickly comprehensible language, though in legal substance it is considered to be the same as the version contained in the United States standard draft. Both versions, however, represent the maximum commitment that the Department of State feels the United States is now in position to undertake. A considerably more ambitious undertaking is conceivable, but the present state of evolution of arbitration

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law in the United States is such that undertakings greater than those proposed are not practicable (even assuming that their desirability is agreed). Some of the States of the United States have adopted much more "advanced" concepts of the value and propriety of the arbitration process for settling disputes, otherwise referrable to litigation, than have others; the pattern of the relevant statutes and judicial decisions is quite uneven over the country as a whole. The proposal made by the Department of State, drafted in light of that circumstance, is confined to simply adapting to the commercial arbitration field, insofar as practicable, the national treatment and most-favored-nation standards which figure so largely in the scheme of the treaty as a whole.

With respect to specific questions raised by the German negotiators, the Department of State observes that the proposed draft does not say either that the decision of an arbitration body is final and unchallengeable, or that it is not. It says that when an award has reached the stage of finality and enforceability under the laws of the country where the arbitration body sits and renders its decision, it shall be entitled to the applicable measures of enforcement available in the treaty country where enforcement is sought; and that the courts of the latter shall not deny enforcement on the grounds that the award is tainted with alienage, but may deny enforcement only on such objective grounds as would likewise render a domestic award fatally defective. The treaty thus respects the right of each country to decide what role its courts ought to play in the commercial arbitration process; and the Department of State is convinced that a treaty of the type under negotiation cannot hazard to undertake to write new commercial arbitration law, which would place a limited group of international commercial arbitration in a special class apart from, and in a status more privileged than, the generality of commercial arbitrations.

The Department of State also observes that it does not understand precisely what is meant by "guarantees concerning security for execution of awards", insofar as this relates to matter not already covered in the preceding paragraph.

As to extension of the provision to cover recognition of clauses providing for submission of future controversies, the position of the Department of State is that the treaty should be neutral in this connection, avoiding a stipulation either that such future-submission clauses must, or that they may not, be recognized by the courts of the jurisdiction where enforcement is sought. That is, each jurisdiction should be left free to determine

determine as a matter of its general public policy whether such clauses shall be enforceable, so long as discriminatory disabilities are not placed upon alien arbitrations, as compared with domestic, in the matter. Most of the heavily commercial States (e.g., New York) have adopted modern arbitration laws under which clauses providing for future submissions are enforceable; but there are yet some States where there persists the common-law view that parties to a contract cannot be forced to submit to an arbitration except with reference to a controversy already in existence at the time the contract was entered into and therein provided for. Until the States share a more universal view, it is not considered wise or expedient to attempt a more far-reaching treaty engagement than that proposed, even though as a practical matter there may appear to be slight likelihood that the courts of the States maintaining the common-law attitude will become involved in arbitrations of the international character arising under the treaty.

With final reference to paragraph 2 of Article V, it will be recalled that the German negotiators expressed preference for limiting arbitration proceedings solely to commercial transactions. The Department of State observes that, if the German view continues to be that the scope of the provision should be expressly confined to controversies arising out of commercial transactions, the Department would not object to placing appropriate qualifying language in the treaty to that effect.

cc: EU:GER:GEA
E:OD
PA:OD
OGC—Mr. H.S. Lay
E:FNP

U.S. High Commissioner for Germany
Bonn, November 23, 1953

CHBoehringer/mm November 23, 1953 (Original initialled CHB)

Noted Dated December 9, 1953
(Ex. 12)

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THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

The Office of the United States High Commissioner for Germany presents its compliments to the Federal Ministry of Foreign Affairs, and has the honor to refer to its note of November 23, 1953, and previous notes, containing comment from the Department of State regarding various points raised in the current discussions with respect to a new treaty of friendship, commerce and navigation between the United States and Germany.

This Office is now in receipt of communications from the Department of State which contain comment on Article VII of the United States standard draft regarding business activities of persons and companies. Discussion on this Article took place in the Ministry of Foreign Affairs on October 15 and 19, 1953.

According to the Department of State, this Article may be considered the heart of the treaty presently under negotiation; especial care has gone into its drafting, and the Department of State has special regard for it. The Department's views on the principles it reflects, while not final or definitive in the sense of being arbitrary or inflexible, are earnest and long-considered. Differences between the present standard version as proposed to the German negotiators and the treaties concluded with other countries at various times in the past are attributable to the continuous effort made to improve the adequacy of the standard wording, and to the adjustments that have sometimes had to be made during the give and take of negotiation in deference to views strongly urged by other countries in light of special problems they faced. Such differences, therefore, reflect the importance rather than the unimportance attached to the Article.

It will be recalled that, during theinitial [sic] discussion of Article VII, the German negotiators expressed the viewpoint that, in

their opinion, they considered the Article as presently drafted as somewhat over-cautious and overlapping. The Department does not consider Article VII to be over-cautious, and further notes that during the third and fourth business meetings, which were devoted to discussions on Articles VII and VIII, the German negotiators brought up several points which suggest that they hesitate to undertake commitments as extensive as those proposed by the Department.

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The Department of State does not find "overlapping" features in its draft of Article VII. Its desire is and has been that the draft be as concise as feasible and as free as possible of duplicating wordage; and any suggestion the German negotiators may wish to make with a view to more fully realizing this objective, without sacrifice of clarity and legal sufficiency, would be welcomed. However, the German suggestion to deal with the treatment of individuals and corporations, respectively, in separate provisions seems calculated to produce the contrary result of introducing needlessly repetitious wordage into the treaty.

During the preliminary discussion of Article VII, the German negotiators stated they had gained the impression that the language of that Article, and also Article VIII, had been drawn up to include safeguards against possible recurrence of unfortunate experiences with certain countries. The Department of State notes that, in drafting Article VII, it had no particular country or category of countries in mind, but aimed merely at establishing a body of rules deemed to be sound and equitable for generally all countries with enlightened concepts of law and a belief in private enterprise.

The Department of State notes with satisfaction that the German negotiators appear to feel that their concept of the principle which ought to be embodied in paragraph 1 is in accord with the

Department's. A meeting of minds on this acore [sic], in the opinion of the Department, forwards the negotiations a major step, in view of the very important role this paragraph plays in the scheme of the treaty.

It will be recalled, however, that the German negotiators made a reservation to paragraph 1 by noting that the provisions applicable for aliens contained in paragragh 12 of the Gewerbeordnung (Law on Trades) and paragraph 292 of the Aktiengesetz (Corporation Law) would have to be maintained.

The Department of State indicates that, if it correctly reads the quoted sections of these two laws, they are readily reconcilable with the treaty, along the lines of the proposal made by the German negotiators for resolving the apparent difficulty. That is to say, these laws both expressly recognize the authority of the Government to make paramount treaty commitments with regard to the establishment of alien-controlled businesses. Paragraph 3 of Article VII, on the other hand, would allow the German Government to maintain "special formalities" in connection with the establishment of American enterprises. The licensing system contemplated by the German legislation could therefore be maintained, so long as the

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necessary licenses were in the case of Americans "granted automatically and as a matter of course", as stated by the German negotiators, thus making of the requirement a mere formality.

So far as the treaty is concerned, it would be irrelevant whether the licensing authority resides in the Federal Government or in the Laender. As a matter of fact, control over the formation of corporations and the establishment of business in the United States is likewise under State, rather than federal, jurisdiction.

The Department of State does not wish to hazard a formal general interpretation of the phrase "special formalities" as

used in paragraph 3 of this Article. It is believed preferable to state the idea envisaged in comprehensible general terms and to let interpretation evolve on a case-by-case basis. It might be said, however, that paragraph 3 was included on the theory that while the treaty should be firm as to the core principle of non-discrimination set forth in paragraph 1, it ought for very practical reasons to allow a degree of tolerance at the periphery with respect to matters of detail that in relation to themain [sic] objectives are of only trivial consequence. The aim is to afford a viable solution, in just the terms suggested, to just such a problem as that posed by the Gewerbeordnung and the Aktiengesetz. In the United States, the formula covers, for example, the requirement found in the domestic corporation laws of certain States to the effect that the signers of articles of incorporation must be American citizens. But, as is well known, this requirement is in effect a mere technicality which in no way actually hampers aliens from freely taking out corporation charters in that country, for citizens willing to act as signers are readily procurable.

The Department of State is of the opinion, as tentatively advanced by the American negotiators at the October 15 meeting, that the insurance business ought to be left fully covered by the rule of paragraph 1. American insurance interests, moreover, have taken particular pains to make known to the Department and to the Senate their desire and expectation that their foreign and international business be adequately dealt with in treaties of friendship, commerce and navigation; and failure to do so in the case of the treaty under negotiation would undoubtedly provoke vigorous protest.

It will be recalled that on October 19, the Economics Ministry technical expert on insurance matters stated that his Ministry would be willing to drop a proposal to add insurance to the list of reserved enterprises given in paragraph 2, if it were clearly understood that the licensing requirement were covered by the term "special formalities" mentioned in paragraph 3 of this Article.

Without

Without a more detailed knowledge of the German insurance law and regulations, and the way the Federal Government might propose to apply the same in light of the treaty when it comes into force, the Department of State indicates that it is unable to venture a categorical opinion, but for the moment must confine itself to an "in principle" agreement with the position taken by the insurance expert of the Ministry of Economics. Just what does and what does not fall properly within the purview of "special formalities" would need to be measured against the special nature of the insurance business, and the practical dimensions of the task faced by the insurance regulatory bodies of assuring that the alien company is reasonably well equilibrated to the domestic economy, for the purpose of protecting the policy-holding public. In the field of insurance, it is considered legitimate to require reasonable bond of alien companies, so as to assure that there will be within the jurisdiction realizable assets to back their obligations to policy holders; domestic companies are not required to post the same bond because they already have reachable assets within the jurisdiction. The Department adds that the Economics Ministry insurance expert correctly stated that bonding requirements, similar to those enforced in Germany, exist in the United States. If the deposit required in Germany is considered reasonable according to accepted insurance standards, conflict with the treaty commitment would not appear to arise.

It has been suggested by the Department of State that this Office might appropriately invite attention to a Minute of Interpretation worked out to clarify the meaning of "national treatment" for insurance in the case of the Treaty of Friendship, Commerce and Navigation between Denmark and the United States. That Treaty was negotiated on the basis of an earlier standard draft that lacked the "special formalities" provision. This interpretative understanding reads as follows:

> "It is understood that either Party may, consistently with the terms and intent of the Treaty, apply specialrequire-

ments [sic] to alien insurance companies with a view to assuring that such companies maintain standards of accountability and solvency comparable to those required of like domestic companies, so long as such requirements do not have the effect of discrimination in substance against such alien companies."

Regarding paragraph 2 of Article VII, it will be recalled that the German negotiators inquired whether the word "communications" included broadcasting and television. The Department of State has informed this Office that the response is in the affirmative.

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With respect to "air and water transport", also in the first sentence of paragraph 2, the German negotiators questioned the necessity of including the words "air or" on the ground that a separate German-American air transport agreement was intended to cover in detail all questions relating to air transport. The German negotiators suggested that a clause be incorporated in the final protocol noting that both sides were desirous of negotiating a special bilateral air transport agreement as soon as possible.

In commenting upon the German suggestion, the Department of State notes that there would probably be no objection, in principle, to placing in the protocol a suitable clause to the effect that both countries are desirous of concluding a special bilateral transport agreement as soon as possible. It may transpire, however, that an air transport agreement will have been concluded before the treaty presently under negotiation, or else may be so far advanced in the negotiation by the time the treaty is ready for signature that there will be no point to such a clause.

Reference is now made to the discussion which took place on October 15 regarding the words "banking involving depository

and fiduciary functions", which appears in the first sentence of paragraph 2. It will be recalled that the German negotiators expressed preference for the following change in language: "banking, insurance and fiduciary functions", on the ground that all banking, insurance and fiduciary transactions require special licenses under German legislation.

In its comments on the words "banking involving depository or fiduciary functions", the Department notes that the object of this wording is to circumscribe the reservation as much as feasible, and thus to maximize the extent to which the banking business is covered by the rule of the first paragraph. "Fiduciary" and "depository" designate the aspects of the business which involve the custody and handling of "other people's money" and which, for that reason, lay banks open to the strictest measure of public regulation and control. The standards applied in this connection are, indeed so severe in the United States that "branch banking" across State lines is generally prohibited; that is, a State will permit only banks chartered under its own laws to do a general deposit-receiving business within its boundaries, and will not extend the privilege to branches of banks chartered in other States. Insofar as other aspects of the banking business are concerned, strong reason for a treaty reservation tends to disappear; and it is believed that there is a real interest in and need for banking activities on an international plane that do not entail the maintenance of a deposit-receiving business in the foreign country (except an accommodation and forwarding-agent function on behalf of home-office clients, which

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would be permitted by the third sentence of paragraph 2). For example, a bank may wish to maintain a foreign branch to handle letters of credit and travelers' checks, finance international trade transactions, service loans it has made to borrowers in the foreign country, et cetera.

During the course of the discussions on October 19, a representative from the Transportation Ministry inquired whether the right which either party could reserve with respect to limiting the extent to which aliens might establish, acquire interests in, or carry on enterprises, as provided for in sentence 1, paragraph 2, was limited by existing or future legislation or to be determined in each case, regardless of applicable legislation. According to the Department, it is correct that the limitations referred to may be in either existing or future legislation. The reservation is open-end as to the time the legislation may be adopted; but the legislation is subject, of course, to the qualifications stated in the second and third sentences.

A question also arose on October 19 regarding the coverage of the word "transportation", contained in the third sentence of paragraph 2. According to the Department, the reference to transportation has significance only insofar as transportation is referred to in the first sentence of paragraph 2. Except as transportation is reserved in the first sentence, the subject remains under the full rule of paragraph 1; and the purpose of the third sentence is to restore to the coverage of paragraph 1 a portion of what was abstracted from it by the first sentence reservation. The word "transportation" in the third sentence could therefore, if fully spelled out, read "air or water transport" as in the first sentence.

As previously indicated, the word "communications", also given in the third sentence of paragraph 2, does include radiobroadcasting. The Germannegotiators [sic] stated that if this were the case difficulties would result from existing German legislation in this field. It will be recalled that the German negotiators promised to supply the American negotiators information on all German legislation which might conceivably be in conflict with sentence 3, paragraph 2, Article VII. To date this material has not been received.

It will also be recalled that on October 19, the German negotiators asked for comment on the words "in which they are permitted to engage", also contained in the third sentence of paragraph

2, with special reference as to by whom, that is, the home country or the host country, would the permit be granted.

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According to the Department of State, the passive-voice form ("are permitted to engage") here, as elsewhere in treaty drafting, has reference to the permission vouchsafed by the host country. The wording here is not intended to imply, however, that the host country retains discretion arbitrarily to withhold permission. The intendment is that the relevant enterprises of each party shall be permitted to establish and maintain agencies and branch offices necessary to the effective conduct of their legitimate international business.

Comment from the Department of State on other subjects discussed during the October 15 and 19 meetings will be given in a subsequent note.

U.S. High Commissioner for Germany
Bonn, December 9, 1953

Copy to:
EU:GER:GEA
E:OD
PA:OD
OGC—Mr. S.H. Lay
E:FNP

E:CAD:CHBoehringer:maa
Tel. Mehlem 3265/66 (Original initialled CHB)

Note Dated December 10, 1953
(Ex. 12)

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THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

The Office of the United States High Commissioner for Germany presents its compliments to the Federal Ministry of Foreign Affairs, and has the honor to refer to its note of December 9, 1953, and previous notes, containing comment from the Department of State regarding various points raised in the current discussion with respect to a new treaty of friendship, commerce and navigation between the United States and Germany.

This Office has now received comment from the Department of State regarding paragraph 2 of Article V which, in its entirety, deals with judicial rights and commercial arbitration. It will be recalled that discussions on paragraph 2, which relates solely to commercial arbitration, were held in the Ministry of Foreign Affairs on October 22 and 26, 1953.

On October 26, the German negotiators referred to the American negotiators an article entitled "Handelsschiedswesen in den USA" (Arbitration System in the USA) from the September 3, 1953 issue of the Mitteilungen der Bundesstelle fuer Aussenhandelsinformation (Communications of the Federal Office for Information on Foreign Trade). On that occasion, the German negotiators stated that if official confirmation could be obtained from the Department of State regarding the accuracy of the statements contained in that article, with special reference to finality of arbitration verdicts and enforcement of awards rendered by arbitration commissions, the difficulties discussed during the course of the October 22 meeting would be largely overcome.

The Department of State has informed this Office that it does not feel that it can properly undertake to make official

pronouncements as to what the details of law of the several States may be in a matter of this sort, as such an undertaking would be outside its functions; nor is it equipped to undertake a thoroughgoing commentary even of an informal sort on the article in question cited above. The complexity of such a task is illustrated by the fact that the Corpus Juris Secundum (CJS) of the United States devotes 155 pages to a general summary of the law on Arbitration and Award. Allowing, however, for oversimplifications, differences in legal terminology, translation difficulties, et cetera, the article would appear in the main to give a not misleading general picture. The list of

jurisdictions

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jurisdictions having modern statutes providing for future-dispute arbitrations, for example, coincides with the published list (dated 1952) prepared by a leading American authority on the subject; and the article's underlying premise that the courts of the United States generally tend to favor and support lawful and proper arbitrations is consistent with the opinion of competent students of the subject, as the two following quotations will illustrate:

> "Although as already noted arbitration was early recognized at the common law as a mode of adjusting matters in dispute, yet, from efforts perceptible in the early cases to construe arbitration proceedings and awards so as to defeat them, it would seem that they were not originally favored by the courts. This hostility, however, has long since disappeared, and, by reason of the fact that the proceeding represents a method of the parties' own choice and furnishes a more expeditious and less expensive means of settling controversies than the ordinary course of regular judicial proceedings, it is the policy of the law to favor and encourage arbitration. In proper cases the

courts are reluctant to limit the scope of the remedy; and every reasonable intendment will be indulged to give effect to such proceedings, and in favor of the regularity and integrity of the arbitrator's acts." (6 C.J.S. 152-3).

"The finality of decisions, without appeal therefrom, is now legally established. Although few principles of arbitration have been more subject to attack from the legal viewpoint, courts have quite universally respected the right of parties so to bind themselves. Many have been the methods used to defeat this principle. One has been a provision in arbitration law permitting either party to refer to a court a question of law that he thinks has arisen during the arbitration. In two states, namely Connecticut and Massachusetts, a question of law must be presented to a court for determination during the arbitration, if both parties so request. In Illinois and the four states which have enacted the Uniform Arbitration Act (Nevada, North Carolina, Wyoming and Utah) either party or the arbitrator on his own motion may request a legal ruling from a court. In states where this type of law prevails, arbitration is infrequent.

"While it is true, under statutory arbitration laws that provide for review on the grounds of misconduct on the part of the arbitrator, that courts have been tempted

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to examine awards as to errors of judgment with a view to the annulment of the award, on the whole there exists today under arbitration law a security as to finality of decisions by the arbitrator which greatly attracts parties to arbitration.

"Thus, it was held in Fudickar v. Guardian Mutual Life Ins. Co., 62 N.Y. 392 (1875), p.400: 'The courts in this

State have adhered with great steadiness to the general rule that awards will not be open for errors of law or fact on the part of the arbitrator,' and it was said in Wenger & Co. v. Propper Silk Hosiery Mills, 239 N.Y. (1924), at p. 202: 'It is the duty of the court to enforce their agreement rather than to undertake itself to settle the dispute or to narrow the field of arbitral disputes.' More recently it was stated in Spring Cotton Mills v. Buster Boy Suit Corp., Inc., 275 App. Div. 196 (1949): 'Every award rendered in compliance with all legal requirements is a complete, final and binding determination of a controversy which may not be disturbed, unless the statutory grounds for doing so exist.'

"In conclusion, it may be affirmed that notwithstanding an occasional adverse decision, the attitude of courts toward the legal enforcement of agreements and awards is a favorable one, as the following indicate:

"It has been declared to be the obligation of the courts 'to shake off the old judicial hostility to arbitration,' or 'here again we should not choke the arbitration process which has been given congressional approval by the fetters of earlier judicial conceptions,' or 'there is a studied effort in the (U.S.) Arbitration Act to provide for the enforceability in designated tribunals of the decisions reached by arbitration boards.' [Federal citations].

"In the interpretation of submission agreements and awards alike there is noticeable a more liberal attitude to uphold awards wherever possible and to give a liberal interpretation to arbitration agreements. This was recently pointed out in several decisions of Supreme Courts, as for instance in Iowa, where the court said: 'the settlement of civil disputes by arbitration is a legally favored contractual proceeding whose object is to speedily determine the matter by a tribunal chosen by themselves, and thereby avoid the formalities, delay and expense of litiga-

tion in court'; and in Kentucky: 'this court, has, as have a majority

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majority of courts in other jurisdictions, by their endorsement thereof, encouraged settlements by compromise or arbitration, and construed applicable law liberally to uphold awards thus made, where there is no showing of fraud or mistake'; and again in Louisiana: 'the primary purpose of the Louisiana arbitration statute is to enforce agreements to arbitrate and the awards of the arbitrators'; in New York: 'arbitration is to be encouraged.'

"Other states have announced similar support in their court decisions. For example: in North Carolina, (it is) 'the policy of the law and the care of the courts to liberally sustain this very effectual and valuable method of bringing controversies to an end, considering that in many instances the controversy may have a more friendly ending and a speedier determination, and even a greater probability of justice between the litigants than may be afforded by the more belligerent methods of trial in the courts of law'; in Texas 'arbitration is a proceeding favored in Texas law . . . . We know of no instance under the laws of Texas where a party has a capacity to conduct litigation, that he has not also power to refer this litigation to fair and impartial arbitrators for arbitration.' " (Kellor, Arbitration and the legal Profession, pp. 27-8, 29-31).

It may be noted, however, in reference to the concluding section entitled "Legal Recourses", that in addition to the grounds listed an award may be upset on the ground that it was based on an illegal contract or related to an illegal transaction (e.g., a gambling debt); that the procedures prescribed by statute or in the arbitration agreement were not observed; or

that the losing party was not given due opportunity to appear and be heard. The variance of conceptions among the States as to the enforceability of an agreement to arbitrate future disputes, moreover, leads to differences in the view that might be taken toward an award concerning a "future dispute" rendered pursuant to a proceeding deliberately boycotted by one of the parties. In connection with this, and also as of pertinence to the general status of arbitration law in the United States, the following further quotation from a well-known authority is offered:

> "In the United States, Gilbert v. Burnstine, decided by the highest New York court in 1931, is the foremost authority for the enforcement in this country of arbitration awards made in foreign countries. (255 N.Y. 348, 174 N.E. 706). In the Gilbert case, the award was rendered by a London tribunal after notice of the arbitration had been served on the defendant in New York. The defendant refused to appear before the tribunal in London and did not participate in the arbitration. Nonetheless, the New York court
>
> held

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> held that the award would be enforceable in New York if the arbitration had been held in conformance with the arbitration law of England.
>
> "It is important to note that the Gilbert case conditioned the enforcement here of foreign arbitration awards on the proper acquisition by the foreign arbitration tribunal of jurisdiction over the non-English defendant. If the foreign arbitration tribunal does not acquire proper jurisdiction over the American national defendant, then it is entirely possible that the American defendant could successfully defend an action in the courts in this country

on the award granted by the foreign tribunal. But it is simple for the foreign tribunal to acquire jurisdiction over the American national as a properly drawn arbitration clause will provide for the arbitration tribunal, the place in which the arbitration is to be held and that the American resident submits, by signing the contract containing the arbitration clause, to the jurisdiction of the foreign arbitration tribunal. Under these circumstances the award will probably be enforced in almost all important international trading states in the United States. The Gilbert case and subsequent cases which have followed it have probably done more in the United States for the enforcement of arbitration awards rendered by foreign arbitration tribunals than the Geneva Convention of 1927 did for the states which ratified it." (Rosenthal, "Arbitration in the Settlement of International Trade Disputes", KI Law and Contemporary Problems (1946), 808, 823).

In conclusion, the Department of State has informed this Office that, should there be some precisely defined questions in the field of commercial arbitration which the German negotiators wish to have clarified in connection with their consideration of paragraph 2, Article V, the Department will endeavor to ascertain the answers.

U.S. High Commissioner for Germany,
Bonn, December 10, 1953.

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Note Dated December 12, 1953
(Ex. 12)

RESTRICTED

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

The Office of the United States High Commissioner for Germany presents its compliments to the Federal Ministry of Foreign Affairs, and has the honor to refer to its note of December 10, 1953, and previous notes, containing comment from the Department of State regarding various points raised in the current discussions with respect to a new treaty of friendship, commerce and navigation between Germany and the United States.

This office is now in receipt of a communication from the Department of State containing comment on the exchange of views held on October 8 and 26, 1953, between the German and American negotiators with respect to Article VI regarding protection of property. Preliminary comments on certain aspects of those discussions were transmitted to the Ministry of Foreign Affairs by means of this Office's note of November 5, 1953.

As indicated in the last cited note, the German suggestion that the words "and in accordance with due process of law" be inserted in the first sentence of paragraph 4 is acceptable to the Department. However, the two further changes suggested by the German negotiators during the course of the October 26 meeting appear, in the Department's viewpoint, to be questionable. It will be recalled that the German negotiators suggested that the first sentence of paragraph 4 be altered to read:

> "Property of nationals and companies of either Party must not be taken or otherwise restricted within the territories of the other Party except for overriding reasons of public welfare and in accordance with due process of law, nor shall it be taken without prompt payment of just compensation."

The first suggested change, namely, the insertion of the words "or otherwise restricted" after "taken" appears to imply a greater commitment than the United States is prepared to undertake. Discriminatory restrictions on property being already precluded elsewhere in the draft treaty, the apparent effect of this insertion

would

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would be to prohibit all types of non-discriminatory restrictions on property except on payment of compensation to the alien property owner even in cases where payment is not normally made, or expected to be made, to anyone. A municipal zoning ordinance prohibiting the erection of a factory in a residential zone, or an apartment house in a zone reserved to single-family houses, is a restriction on property and a restriction, moreover, which can greatly affect the market value and income-producing potentialities of a tract of land. But compensation is not paid to the owners affected by a valid zoning ordinance; and the Department observes that it does not readily perceive why a treaty exception should be made in favor of German property owners in United States municipalities (or mutatis mutandis, American owners in Germany). Many other types of legitimate restrictions that do not give rise to compensation can be cited: for example, a restriction on the use of certain properties, or properties in certain areas, for the sale of alcoholic beverages; restrictions on the rates a utility company may charge, or on the areas in which it must or may not furnish services; regulations relating to the conservation of soil and water, and afforestation, in rural districts; et cetera.

It is true that on a strict and literal reading of the German-proposed language, compensation for "restrictions", as distinguished from "takings", is not technically required; and a mere assertion that property shall not be restricted except for good reasons of public policy and in accordance with law would

hardly seem objectionable. However, placing this idea in the context of paragraph 4, the primary concern and orientation of which is a rule on compensation, leaves the impression that its purpose is somehow to suggest that compensation must be paid for "restrictions" falling short of "takings", especially when paragraph 3 already prohibits arbitrary restrictions on property and it is not to be supposed that merely repetitious material would be included in paragraph 4.

Having stated the foregoing objection to the insertion regarding "restrictions", the Department may well add that the word "taken" has been chosen to convey the idea that the standard rule on compensation is aimed to cover more than outright physical seizures. The word is borrowed from United States constitutional jurisprudence, where it covers indirect deprivations of property of the so-called "Tucker Act" type as well as direct expropriation proper.

The second additional change, namely, substituting "overriding reasons of public welfare" for the phrase "a public purpose" appears to the Department of State to be an unnecessary refinement. If "overriding reasons of public welfare" means more than "public purpose", it would appear to constitute a latent source of fruitless friction over particular judgments as to whether this or that

taking

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taking is or is not dictated by "overriding" reasons. If a Government determines to take a given property for plausible reasons which it considers to be in the public interest, and not for the mere benefit of private interests, it is very doubtful whether anything useful is to be gained by subjecting that decision to treaty challenge on the ground that it was not really dictated by unavoidable force of circumstance. The important objective on which the treaty might most usefully concentrate is assurance of proper compensation if there is a taking.

Should additional comments on Article VI be received from the Department of State, such comment will be transmitted to the Ministry of Foreign Affairs.

U.S. High Commissioner for Germany,
Bonn, December 12, 1953.

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Note Dated December 14, 1953
(Ex. 12)

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The Office of the United States High Commissioner for Germany presents its compliments to the Federal Ministry of Foreign Affairs, and has the honor to refer to its note of December 12, 1953, and previous notes, containing comment from the Department of State regarding various points raised in the current discussions with respect to a new treaty of friendship, commerce and navigation between Germany and the United States.

This Office is now in receipt of communications from the Department of State containing comment on the exchange of views which took place on October 26 and 29, 1953, with respect to Article IX regarding property rights.

In connection with the October 26 general discussion on Article IX, the Department observes that the formulation of the rule on real property follows in essence the standard version in the treaties with Italy and several other countries (e.g., Israel, Uruguay and Colombia). The different versions appearing in the United States FCN treaties with Ireland and Denmark are the consequences of changes made during the process of negotiation. Ireland and Denmark both had actual or prospective features in their land legislation, for reasons peculiar to those countries, that made it impossible for them to accept the standard version without qualification. The reservations that they would have required were such that the most satisfactory approach proved to be a restatement embodying a more limited and less positive reciprocal rule. The standard version asserts a stronger body of rights, from the viewpoint of both parties, and the Department of State is pleased that the German Government concurs in it.

It will be recalled that on October 26 the American negotators [sic] presented to the German negotiators copies of a memorandum dated December 8, 1947, prepared in the Department of State and entitled "Rights of Aliens to Acquire Interests in Real Estate in the Several States". There are now enclosed single copies of two informal studies received from the Department and entitled "Ownership of Real Property in the United States by Alien Corporations" and "Ownership

of

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RESTRICTED -2-

of Real Property in the United States by Aliens", respectively. These represent a recent revision and refinement of the material contained in the above cited memorandum of December 8, 1947, and they reflect a considerable amount of research devoted to make as accurate and up-to-date summary of this complicated subject as the facilities of the Department permit. It will be noted that these do not purport to be official statements concerning State laws.

The Department has also given comment with respect to paragraph 3 of Article IX. In an earlier version of the standard draft this paragraph was no. 4. In order to avoid the possibility of misunderstanding, paragraph 3 is given below:

> "3. Nationals and companies of either Party shall be accorded within the territories of the other Party national treatment and most-favored-nation treatment with respect to acquiring, by purchase, lease, or otherwise, and with respect to owning and possessing, personal property of all kinds, both tangible and intangible. However, either Party may impose restrictions on alien ownership of materials dangerous from the standpoint of public safety and alien ownership of interests in enterprises carrying on particular types of activity, but only to the extent that this can be done without impairing the rights and privileges

secured by Article VII or by other provisions of the present Treaty."

The Department notes that the second sentence embodies an exception to the first, and is intended to permit either party to depart from the rule of national treatment to the extent specified. In this sense there is indeed a "conflict" between the language of the first and second sentences, as there must be if the scheme of stipulating broad national treatment subject to a defined exception is to be followed.

The Department further notes that it does not quite follow the German argument with reference to "secret patents". Paragraph 3 does not have to do with the establishing of a patent right, a matter which is dealt with in Article X on industrial property, though it would be applicable to the buying, owning, and possessing, et cetera, of a duly established patent. If the law of a party allowed its nationals to take out "secret" patents (a factor of Article X), and if the law further permitted such patents to be alientated by, and bought and sold among, nationals, Article IX (3) would in principle vouchsafe to the treaty alien the same right to buy or otherwise obtain title to such patents and to own and possess the same as though a national. (This, of course, assumes that some controlling factor

[End of page]

factor governed by the security reservations in Article XXI, paragraph 1 (d) is not present). The Department did not have a "secret patent" situation in mind when the second sentence of paragraph 3, Article IX, was formulated, and has not seen any particular reason why such patents should be included in the reserved matter of that sentence. The broad rule of the first sentence is a fairly recent innovation in treaty-making; and the major purpose of the second sentence is to close a loophole through which the reservations in Article VII, paragraph 2,

might otherwise be frustrated. That is, if the first sentence were not suitably qualified, an alien would become entitled through a process of stock buying to acquire a controlling interest in a corporation with respect to which the law, pursuant to Article VII (2), did not allow aliens to have a controlling interest.

Enclosures:

"Ownership of Real Property in
the United States by Aliens";
"Ownership of Real Property in
the United States by Alien Corporations."

U.S. High Commissioner for Germany,
Bonn, December 14, 1953.

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Note Dated December 15, 1953
(Ex. 12)

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THE FOREIGN SERVICE
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The Office of the United States High Commissioner for Germany presents its compliments to the Federal Ministry of Foreign Affairs, and has the honor to refer to its note of December 14, 1953, and previous notes, containing comment from the Department of State regarding various points raised in the current discussions with respect to a new treaty of friendship, commerce and navigation between Germany and the United States.

This Office is now in receipt of communications from the Department containing comment on the discussions held on October 19 and 29, 1953, regarding Article VIII concerning employment, professions and non-profit activities.

It will be recalled that the German negotiators suggested that Article VIII could be eliminated in its entirety for the following reasons:

1. Paragraph 1 was considered unnecessary and self-evident with regard to the relationship between Germany and the United States;

2. Paragraph 2 was considered inappropriate since it would apparently be subject to U.S. Senate reservation, and

3. Paragraph 3: The content of this paragraph was contained in the German proposed revision of Article III.

Discussion on October 29 was directed to the version of Article VIII dated January 19, 1953. However, as subsequently indicated in the current negotiations, that version has now been superceded by a version dated January 21, 1953, a copy of which is in the hands of the German negotiators. In the

revised version, the former paragraph 2 has been dropped from the draft, in consequence of the Senate reservation. In the former paragraph 3, now paragraph 2, the words "and professional" are omitted from the list of activities.

During

[End of page]

RESTRICTED -2-

During the October 19 discussions, the German negotiators asked, with respect to paragraph 1, whether the word "engage" in the first sentence, pertained to the internal operations of nationals and companies. The Department observes that the position taken by the American negotiators, namely, that the entire paragraph 1 was limited to such operations, is correct. The Department adds that the rule does not reach to the right to engage in the "practice" of a profession, as that concept is generally understood, but only to the right of an enterprise to have the services of professionally trained technicians in connection with its internal affairs.

With regard to the German suggestion that paragraph 1 might be deleted as being unnecessary and self-evident, the Department observes that it has some difficulty understanding that position. The mere fact that a provision may merely seem to confirm the continuance of a situation that actually exists without a treaty does not, in the Department's opinion, constitute a sufficient reason for deleting it. This kind of reasoning, indeed, could lead to excising the bulk of the present content of the draft.

The dropping of old paragraph 2 increases the desirability of maintaining paragraph 1, for without paragraph 2 American investors, and conversely professional groups such as accountants and engineers, must look to paragraph 1 for their treaty rights in connection with certain types of servicing that may be necessary to the efficient functioning of a business enterprise. (One example would be the preparation of the kind of account-

ing analysis that the Securities and Exchange Commission requires as a condition-precedent to the public offer of new securities). It may well be, of course, that American firms would require less American-trained specialist assistance in Germany than in many other countries where there exists a considerably smaller reservoir of qualified local professional personnel, and that the German Government in fact has no intention of hampering the very limited type of activity contemplated in paragraph 1. Nevertheless, the paragraph embodies a sound and desirable principle that ought to be asserted in the treaty. The provision is attributed some importance by American interests; and its omission from the treaty would be calculated to arouse apprehensions concerning Germany's intentions, as well as set a bad precedent for negotiations with countries where its presence would be most helpful in curbing extreme tendencies to discriminate against, for example, American accounting firms there established for the purpose of servicing American investments.

The German request for omission of the former paragraph 2 has already been met, as previously indicated. The difficulties involved in attempting to deal with the subject matter of old paragraph 3

[End of page]

paragraph 3 (now paragraph 2) in the way the German negotiators have suggested are alluded to in this Office's second note of November 4, 1953, which contains comment on Articles II and III.

It will be recalled that during the course of the October 19 discussions, the German negotiators referred in general terms to Articles VII and VIII, it being noted that those Articles appeared to pertain to independent commercial, financial and other business activities without mention being made of non-independent activities such as those carried on by persons in an

employee status. In commenting on the points raised by the German negotiators on that occasion, the Department of State observes that it does not believe that the draft, though giving special emphasis to "independent" activities, fails to provide for those of a "non-independent" character. The right to "engage in" and "activity" is construed by the Department in principle to include the right to serve in an employee capacity in such activity. This result is clear in the wording of Article VIII, paragraph 2 (the former paragraph 3); and it appears also, though less conspicuously, in the wording of the first sentence of Article VII, paragraph 1, as follows: ". . . . . engaging in all types of . . . . . activity for gain . . . . . directly . . . . ."

U.S. High Commissioner for Germany
Bonn, December 15, 1953.

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First Note Dated December 16, 1953
(Ex. 12)

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THE FOREIGN SERVICE
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UNITED STATES OF AMERICA

The office of the United States High Commissioner for Germany presents its compliments to the Federal Ministry of Foreign Affairs, and has the honor to refer to its note of December 15, 1953, and previous notes, containing comment from the Department of State regarding various points raised in the current discussions with respect to a new treaty of friendship, commerce and navigation between Germany and the United States.

This Office has now received comments from the Department with respect to the discussion which took place on October 29, 1953, regarding Article X which concerns industrial property.

Regarding paragraph 1 of Article X, the German negotiators stated that they considered it superfluous since both the United States and Germany adhered to the Paris Convention on protection of industrial property rights which covered in detail all points pertaining to this field. It was additionally noted that the provisions of this paragraph were not contained in the 1923 Treaty of Friendship, Commerce and Consular Rights between Germany and the United States. It will be recalled that the American negotiators agreed to refer the German proposal for elimination of paragraph 1 to the Department, with the recommendation that it be accepted.

The Department has now indicated to this Office that it does not wish to have paragraph 1 dropped, even though its presence is not indispensable. The reaffirmation of the basic principle contained in the well-established multilateral instrument referred to as the Paris Convention would not appear to be objectionable for any substantive reason. Since the para-

graph has become standard in post-World War II treaties concluded by the United States with other countries, its omission might merely give rise to conjecture which might as well be avoided.

With regard to paragraph 2, the Department notes that it is not correct that this provision is missing from the United States-Japan FCN treaty. That instrument, the first in which the provision appears, carried it as Article V, paragraph 2. The Department is not aware of any separate bilateral Japanese-American agreement

relating

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relating to the subject matter of this provision, and suggests that there must be some confusion over just what individual commitments the United States and Japan have undertaken toward each other. The Department notes that it might help to clarify matters if the German negotiators would more definitely identify what agreement they have in mind. As the German suggestion for transposing and elaborating upon this provision appears to be based, at least in part, on a misunderstanding of United States-Japanese contractual relations, and as this suggestion cannot be confidently assessed until its contemplated outlines are more precise, the Department does not believe it can at this time usefully add much to the comments made with respect to Article I. Those comments, it will be recalled, were transmitted by this Office to the Ministry by means of its first of two notes dated November 4, 1953.

The Department's present inclination, however, would be against transposing the provision to the head of the treaty, or expanding it to include a variety of other subject matter. The provision relates to a rather narrow technical subject matter most appropriately carried in juxtaposition with one of the relevant specific provisions of the main body of the text.

Article X, dealing with industrial property, appears to be a logical place, though the position favored by the Japanese is hardly less logical.

The Department does not quite share the view expressed by the German negotiators to the effect that paragraph 2 appears to be something in the nature of a good-will gesture without binding commitments. It would expressly commit the parties to an agreed course of action which, though framed in very general and flexible terms, is a clearly indicated course of action in fulfillment of the principle that the discoveries of science should not be hoarded but should be made available to help mankind in its struggle for a better existence.

U.S. High Commissioner for Germany
Bonn, December 16, 1953.

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Second Note Dated December 16, 1953
(Ex. 12)

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THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

The Office of the United States High Commissioner for Germany presents its compliments to the Federal Minis'ry of Foreign Affairs, and his [sic] the honor to refer to its first note dated December 16, 1953, and previous notes, containing comment from the Department of State regarding various points raised in the current discussions with respect to a new treaty of friendship, commerce and navigation between Germany and the United States.

In accordance with instructions from the Department of State, this Office is now in position to transmit to the Ministry the Department's comments on the German proposed Articles 6, 7, and 8, the German and English versions of which were made available to the American negotiators during the course of the October 26 meeting. It will be recalled that the German negotiators, during the October 29 meeting, stated that the proposed three articles were not, as previously understood by the American negotiators, intended to be replacements for Articles VII and VIII and paragraph 3 of Article XXII. Regarding Article VIII, it wll be recalled that the German negotiators suggested that it be eliminated entirely.

The Department observes that, since the German counterdrafts are merely illustrative and preliminary, its comments thereon at this juncture are in the nature rather of preliminary observations and queries than of an exhaustive analysis. The Department notes that it cherishes an attachment to the standard draft Articles in question, these being the fruition of lengthy study and experimentation. Consequently, and for the further reason that the proper presentation of the subject matter of Article VII is most crucial from the standpoint of

achieving a good treaty, proposals for substantial change are not to be lightly regarded.

Referring first to the general explanation given by the German negotiators of the theory underlying the counterdraft articles, the Department seriously questions whether the U.S. standard draft suffers the "logical deficiency" indicated. In fact, the standard

draft

[End of page]

draft fully provides for the specific factors and conditions appertaining to the special nature of juristic, as compared with natural, persons. The question is not, however, a concern solely of Article VII. To the contrary, it is the concern generally of all Articles in the treaty where the rights of juristic entities ("companies", in the standard-draft parlance) are dealt with: for example, Article V (1), Article V (2), Article VI (1), Article VI (2), Article VI (3), and so on for many instances throughout the treaty. If the identification of juristic entities need be the phrase "juristic persons, corporations and companies in Civil and Commercial Law having their seat within the territory of the other Party and existing legitimately under its law" in connection with Article VII subject matter, the same awkward and lengthy identifying phrase would logically have to be employed also in the many other Articles and paragraphs containing mention of such entities. The result would be a cumbersome and verbose document; and the Department cannot visualize why either side should desire that result.

In the opinion of the Department, the standard draft technique is the simple and convenient one of using the single word "companies" to cover all juristic entities of treaty concern; and then to define this term in one paragraph (3) of Article XXII, where there is ample room to deal with the matter as fully as may be desired. The Department suggests that if this definition

is in any way deficient or faulty, the German negotiators are free to propose necessary changes in it.

The status nascendi of a juridical entity is provided for in the second sentence of Article XXII (3). Since such status nascendi (i.e., its legal existence) presumably must be established with reference to a corporation's access to the courts, its acquisition of property, its subjection to taxation, its receipt of compensation owing from expropriated property, et cetera, as well as with reference to its right to do business, the necessary provision therefor is properly the factor of a general "tent" provision such as Article XXII. The status nascendi is, therefore, not the concern of Article VII (3); and the Department indicates that it has some difficulty in understanding the basis for the German objection to it. The "special formalities" envisaged by Article VII (3) start at a point where the legal being of the natural person or the juristic entity is granted (though, of course, one of the formalities could be requirement of documentary proof of nationality in the case of an individual, or of the corporation's legal existence under the laws of its creation, in the case of a juristic entity).

(Examples of the type of thing that such formalities might include are given in this Office's note of December 9, 1953, transmitting the views of the Department of State on Article VII regarding business activities of persons and companies).

In

[End of page]

In the light of the above reasoning, in the opinion of the Department, the German proposal lacks foundation, if the representation of the purpose actuating their draft is taken at face value and properly understood by the American negotiators. On this showing, the separation of the treatment of individuals and juristic entities tends merely to breed repetition, assuming that the bifurcated German scheme should, as suggested, accomplish just what the unitary standard draft

version is designed to accomplish, for the latter is calculated to give individuals and juristic entities alike essentially parallel rights to engage in a broad array of economic activities. The Department ventures to express its opinion that the German counterdraft articles do not appear to accomplish the design of the Department's standard proposal.

Without at this time going into details and subsidiary points of difference, it will suffice, the Department notes, to indicate that the German counterdraft articles provide no treaty rights to any business corporation of either party to establish itself within the other or to engage therein in any activity on terms of equality with its legal competitors. The proposed Article 7 consists of a first paragraph that is considered irrelevant and does not belong here, as the subject matter is covered in Article V (1) and Article XXII (3); a second paragraph reserving to each party an unqualified "screening" right, that is, freedom of action to refuse admittance to the other party's business companies for any reason or no reason, or to impose onerous conditions upon their admittance; and a third paragraph in effect assuring non-discriminatory treatment to an admitted enterprise only to the extent of the operations which it conducts within the scope of the limitations that might be imposed upon it at admission, under the second paragraph.

On balance, the Department observes, the three counterdraft articles, 6 through 8, give the appearance of being more concerned with restriction, limitation and reservation than with the basic treaty objective of establishing positive rights, most especially rights conducive to the flow of investment capital, which, at present, is largely in the form of corporate, rather than individual, capital. Fundamentally, the major treaty right contemplated appears to be most-favored-nation treatment, as indicated in the proposed Article 8.

While this Office believes that a correct report of the German presentation of the counterdraft Articles 6, 7, and 8, was transmitted to the Department of State, and that the Department has

commented

[End of page]

commented on all important statements made in the presentation, as well as on the proposed articles, the possibility exists that the German negotiators may have additional explanatory information to give in support of their proposed articles. Should this be the case, this Office is prepared, of course, to transmit such information to the Department for further consideration of the articles.

U.S. High Commissioner for Germany,
Bonn, December 16, 1953.

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Note Dated February 5, 1954
(Ex. 12)

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THE FOREIGN SERVICE
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UNITED STATES OF AMERICA

The Office of the United States High Commissioner for Germany presents its compliments to the Federal Ministry of Foreign Affairs, and has the honor to refer to its second of two notes dated November 4, 1953, containing, in part, comment from the Department of State regarding various points raised in the discussions held on October 5, 1953, between representatives of the German and United States Governments, in connection with the proposed treaty of friendship, commerce and navigation between the two countries.

Specific reference at this time is made to that part of the note cited above which deals with Article III of the U.S. standard draft relating to protection of persons.

It is suggested that paragraph 1 be modified to read as set forth below, with the added language underscored:

> "Nationals of either Party within the territories of the other Party shall be free from molestations of every kind, and shall receive the most constant protection and security. They shall be accorded in like circumstances treatment no less favorable than that accorded nationals of such other Party for the protection and security of their persons and their rights. The treatment accorded in this respect shall in no case be less favorable than that accorded nationals of any third country or that required by international law."

The purpose of the change proposed is to clarify this provision of the treaty in a manner consistent with the juridical systems of our two countries.

U.S. High Commissioner for Germany,

Bonn, February 5, 1954

Copies to:

EU:GER:GEA
E:OD
PA:OD
OGC—Mr. S.H. Lay
E:FNP

E:CAD:HWalker, Jr./OGC:SHLay;eu

(Original initialled CHB)

Note Dated February 8, 1954
(Ex. 12)

RESTRICTED

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

The Office of the United States High Commissioner for Germany presents its compliments to the Federal Ministry of Foreign Affairs, and has the honor to refer to the discussions held in the Ministry on January 4, 1954, between representatives of the German and United States Governments, in connection with the proposed treaty of friendship, commerce and navigation.

Specific comment is made herein with respect to the discussion on Article II, paragraph 1, of the United States standard draft treaty, concerning entry and basic personal rights.

According to the Department of State, the basic purpose of the treaty trader provision and of the legislation which authorizes the extension by treaty of liberal sojourn privileges for purposes of trade is, of course, the promotion of mutually beneficial commercial intercourse between the parties to the treaty. There is no intent thereby to attempt to regulate the particular form of business entity by which the desired trading activities are to be carried on. Hence it is the practice in administering the treaty trader regulations to "pierce the corporate veil" and to authorize the issuance of treaty trader visas to qualified aliens from treaty countries whose trading activities in the United States would be carried on in the service of a domestic United States corporation.

In this connection, the important consideration is not whether the corporate employer is domestic or alien as to juridical status. The controlling factors are, instead: (a) whether the corporation is engaged in substantial international trade principally between the United States and the other treaty country; (b) whether it is a "foreign organization" in the sense that the control thereof is vested in nationals of the other

treaty country, the customary test being whether or not a majority of the stock is held by such nationals; and (c) whether the individual alien who intends to engage in international trading activities in the service of the corporation is duly qualified for status as a treaty trader under 22 Code of Federal Regulations 41.70, 41.71 and other applicable regulations.

The apparent

[End of page]

RESTRICTED -2-

The apparent discrepancy between the treaty and the Immigration and Nationality Act with respect to use of the term "substantial" is of no legal or practical significance either when considered in the treaty trade clause alone or taken together with the treaty investor clause. Use of the term "substantial" in the treaty trader provision of the Act merely gives explicit recognition in the law to an administrative practice of long standing. It was not deemed necessary to reword the treaty as a consequence, for the treaty provision as now worded has long been applied in a manner requiring that the trade for which entry is permitted shall be substantial in character. This does not derive from Article II (1)(c), however, but from Article II (3), taken together with the general right to apply reasonable and non-discriminatory regulations consistent with the intent and purpose of the treaty provision in order to implement the commitment and to protect the privileges accorded thereby from abuse. In the case of the treaty investor provision, however, the term "substantial" has been carried over from the law to the treaty as an aid to its construction and implementation. This was done simply because the investor clause, unlike the trader clause, is new and an established body of interpretation has not yet developed.

It may be noted in connection with hypothetical cases involving substantiality of trade that this requirement is applied in a liberal manner. In determining the substantiality of

the trade within the meaning of the treaty trader clause, monetary or physical volume are not used as the exclusive criteria. The intent is to assure that the trade in question is not a brief, isolated excursion into international trade but a substantial volume of bona fide commercial transactions. Consequently, the number of transactions, the continuous character of the operations and a number of other factors are taken into consideration as well.

The observation made by Dr. Paulich, German Consul stationed in New York City and present during the January 4 discussions, that the fixing of the period of sojourn for aliens entering the United States as non-immigrants is done by the immigration officers at the port of entry rather than by consular officers when the visa is issued is correct. However, this procedure is specifically required by law and hence is not merely a matter of administrative convenience. Section 214 (a) of the Immigration and Nationality Act expressly vests the Attorney General with authority to prescribe by regulation the period of time for which non-immigrant aliens may be admitted to the United States. A treaty trader or treaty investor, by reason of the purposes of the treaty, is regarded as admitted on an indefinite basis as to

sojourn

[End of page]

RESTRICTED -3-

sojourn, provided, of course, that he maintains his status as a trader or investor under the treaty. Hence the administrative regulations governing entry and sojourn (8 Code of Federal Regulations 214e2) contain no specific limiation [sic] as to time. This does not preclude, however, requirements that the alien comply with reasonable procedures designed to assure that he is maintaining his status as a treaty alien or otherwise complying with the conditions of his admission.

U.S. High Commissioner for Germany,
Bonn, February 8, 1954

Coordinated with: OGC—Mr. Lay
SUPCONGEN—Mr. Livornese

Copies to:
EU:GER:GEA
E:OD
PA:OD
OGC—Mr. Lay
SUPCONGEN
E:FNP

E:CAD:CHBoehringer:eu
Tel. Mehlem 3265/66 (Original initialled CHB)

Note Dated February 9, 1954
(Ex. 12)

RESTRICTED

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

The Office of the United States High Commissioner for Germany presents its compliments to the Federal Ministry of Foreign Affairs, and has the honor to refer to various notes sent to the Ministry during November and December, 1953, and containing comment from the Department of State regarding various points raised in the current discussions with respect to a new treaty of friendship, commerce and navigation between Germany and the United States.

This Office has now received comment from the Department with respect to the discussions which took place on November 16 and 27, 1953, regarding Article XI of the United States standard draft. This Article relates to the subject of taxation.

It will be recalled that, at the November 16 meeting, the German negotiators raised the question of relationship between paragraph 1 of Article XI in the Treaty and paragraph 3, Article XVIII of the proposed Convention between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation with Respect to Taxes on Income, and suggested that, for purposes of uniformity, the same text should be used for, or incorporated in, paragraph 1, Article XI.

The Department is of the opinion that there is no need to make the proposed substitution since there is no conflict between the two paragraphs; each provides a basic minimal standard of treatment and both can be applied simultaneously without disharmony or confusion, during such periods of time as both instruments may be in force. It may also be noted that substitution would encounter serious mechanical difficulties in

view of marked linguistic differences between the two paragraphs.

As the Department believes that the treaty under negotiation and the above cited Convention supplement and reinforce one another, without conflict, it does not perceive the advantage of adopting the suggestion made by the German negotiators that a sentence be added to paragraph 1, Article XI, stating that the Convention should prevail

for taxation

[End of page]

RESTRICTED -2-

for taxation matters. Such a sentence, it is believed would appear to imply that paragraph 1, Article XI, would be suspended during the effective period of the Convention. In the opinion of the Department, it seems highly doubtful that any provision concerning the relationship between the two instruments is needed.

In the event, however, that the German negotiators believe that a cross-relationship provision is necessary, the Department would be willing to consider a protocol provision framed in the sense that where an actual conflict develops between the two instruments (in the sense that the provisions of both cannot actually be applied at one and the same time in a given situation), the Convention would prevail.

With respect to the proposed addition of reference to "under comparable circumstances" in paragraph 1, the Department is of the opinion that the idea sought to be conveyed is implicit in the draft. However, if the addition is considered desirable for translation reasons, the Department would not object in principle. If made, the Department would prefer the wording thereof to be revised to read "in like situations", to conform with the phraseology of paragraphs 1 and 2 of Article XXII. Further, if added to paragraph 1, Article XI, the phrase should also be added in the same way to paragraph 3.

During the course of the November 27 discussions, the German negotiators inquired: "Would Germany benefit from specific tax advantages the United States might wish to extend to Mexico, for example, on the basis of reciprocity?"

According to the Department, the answer to that question is affirmative, subject to the proviso that Germany meet the reciprocity test. The question relates to the meaning of sub-paragraph (a), paragraph 5, the main effect of which is to make the most-favored-nation clause of paragraph 3 conditional, by way of exception to the general rule, as stated in the Preamble, that the most-favored-nation clauses of the reaty [sic] are unconditional. Thus, sub-paragraph (a) could be read as though it recited: "Notwithstanding the provisions of paragraph 3 of the present Article, each Party reserves the right to accord specific advantages as to taxes, fees and charges to nationals, residents and companies of third countries on the basis of reciprocity, provided that nationals, residents and companies of the other Party shall be entitled to the same advantages on the same basis."

A Party

[End of page]

RESTRICTED -3-

A Party has an assured treaty right to an "(a)" type advantage on showing of the requisite reciprocity. A "(b)" type advantage, by contrast, is attainable only through negotiation of a specific double-tax convention, which neither Party is obligated to undertake or bring to completion unless it so wishes. Examples of "(a)" type advantages in United States revenue law include: income tax exemption on income derived from shipping profits by non-resident aliens; exemption from excise on oil, gasoline, at cetera [sic], used by foreign civil aircraft.

In framing paragraph 5, however, the Department did not confine the reservation to paragraph 3 for the reason that in some instances the national treatment rule might also be considered to be involved. An obvious example is afforded by

sub-paragraph (c). Another, relative to sub-paragraph (a), is the provision of 26 of the United States Code 131 (a)(3) which stipulates, in connection with the income tax, that resident aliens shall be allowed the usual credit against foreign income taxes only if their country allows a like credit to Americans there residing in connection with any income tax it may levy.

The German request for a memorandum on matters solely within the competence and jurisdiction of the individual States, as opposed to the Federal Government of the United States, in order to establish all the issues for which the Federal Government could not enter into obligations which would also be binding on the States, may be simply answered. Article VI of the United States Constitution recites: ". . . all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . anything in the Constitution or Law of any State to the contrary notwithstanding". As a generalization, therefore, it can be stated that the treaty power of the Federal Government of the United States is plenary as to all proper subjects of normal international negotiations, notwithstanding the reserved powers of the States. There is no question of the competence of the Federal Government to make binding treaty rules as to the provisions proposed for inclusion in the treaty now under negotiation.

As to the impact of the rule of Article XXII, paragraph 4, upon the tax Article, it should be pointed out that the purpose of this rule is to equate the alien corporation to the American out-of-State corporation. As a practical matter, this places the alien corporation on a par with the bulk of its competitors, in view of the way that business has now come to be conducted typically on an interstate basis

in the

[End of page]

in the United States; and it is proper that the treaty should be adapted to the economic realities. Juridically, the rule avoids

the confusion that would result if one group of "foreign" corporations (corporations chartered in foreign countries) were treated as "domestic" by way of exception to the regime generally followed with respect to "foreign" corporations in the sense of those chartered in other States of the Union. From the viewpoint of policy, the rule avoids unnecessary treaty interferences with the normal functioning of the Federal system of the United States. In light of United States constitutional jurisprudence, and the business life in the United Sates [sic], the rule imposes no consequential inconvenience on the alien corporation; and a different rule would constitute an interference with State prerogatives without compensating advantage. Finally, from the viewpoint of expediency, it is probable that the Senate would regard a different rule as unwarranted and unacceptable.

Moreover, the rule of Article XXII, paragraph 4, would afford certain positive advantage to German corporations in the taxation field. A State is free to tax its own corporations on their entire income, wherever derived; but, under the Constitution as interpreted by the courts, a State can tax a corporation of a sister State only on that part of its income derived from within that State. It is reported that Alabama, Louisiana and North Carolina actually do exercise their right to tax their own corporations on their entire income, irrespective of source (Altman and Keesling: Allocation of Income in State Taxation, pp. 17-18, 61), and other States (for example, Arkansas, Mississippi, and South Carolina) have so done in the past notwithstanding the discriminatory burden that may thereby be placed on their domestic corporations. Again, according to figures taken from Tax Systems (Commercial Clearing House, 1940, pp. 256-260) no less than 17 States had annual franchise taxes that weighed more heavily on their domestic corporations, in that the tax was levied on total capitalization wherever employed, although the tax could be levied only on the capitalization employed within the State in the case of corporations chartered in sister States.

Constitutional protection is afforded the American out-of-State corporation, of course, not only by the commerce clause, but by the "due process" and "equal protection of the laws" clauses as well. The proposed treaty rule would assure that protection to the German corporation, by equating its status to that of American corporations operating outside their State of charter.

U.S. High Commissioner for Germany,
Bonn, February 9, 1954

[End of page]

RESTRICTED -5-

Coordinated with: E:FNP—Mr. Brown (Cleared in draft)
Mr. Walker

Copies to:
EU:GER:GEA
E:OD
PA:OD
OGC—Mr. Lay
E:FNP

E:CAD:CHBoehringer:eu
Tel. Mehlem 3265/66 (Original initialled CHB)

Exhibit 13

[Comment: Initials "HW" appear in upper right hand corner, with two check marks and "X4511"]

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OFFICIAL-INFORMAL September 16, 1955

Dear

The Department's reply to your 208 ought to be on its way by now. The extra copy you sent direct expedited the reply, since it helped us get set. When the yellow arrived, and provided the necessary file copy, that enabled the yellow to be released prior to processing and distribution of the file copies made here.

Your letter of September 12 arrived this morning with the trial-balloon redraft protocol text (the one previously numbered "12" but which is carried as "11" in the FOTO-Btz. 118588 sent under cover of your June despatch 1190). The language, quite apart from being out of the general style of the treaty, is very hard to follow. I read it one way, my boss another and my legal counsel still another, on first impression, though a painful study of it, with the aid of some additional punctuation and the filling of an elision, seems to produce a coherence. But what it actually says, (namely, *inter alia*, that "controlled companies" get as good treatment as their parents) is not what [blank] apparently intends it to say—if I understand correctly the statement in your letter that what he wants, first of all, is that "controlled companies are in fact companies of the country in which they are located". [Comment: "that "controlled companies" get . . . located" is underlined in handwriting]. This I take to mean that a Dutch-controlled American company is to enjoy the same rights of acquiring and owning real property as an American-controlled American company, notwithstanding some State laws to the contrary. I thought they understood by now, and for a long time past, that

any such thing is out of the question. We will not agree to rights in property either directly or indirectly going beyond the limits set by paragraph 1 of Article II for alien individuals, or for alien companies, or for alien-controlled American companies. As you know, and as the Ambassador I think made quite clear last February, that's final.

Esquire,
Counselor of Embassy for Economic Affairs,
American Embassy,
The Hague, Netherlands.

[End of page]

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-2-

Maybe [blank] did not mean this, but only to provide what the unadorned words of the draft in their face seem to mean: namely, that "controlled companies" would be assured (a) most-favored-nation treatment, in the sense of treatment as good as that given companies of third countries; (b) further most-favored-nation treatment in the sense of that given other "controlled companies", i.e., those controled by third-country nationals; and (c) treatment as favorable as that enjoyed under the treaty by parent companies. Earlier (the last time being at the farewell meeting of March 10), when it seemed possible that we might solve all our negotiating difficulties by some kind of formula, we discussed the possibilies of some kind of draft that would meet these three points, subject to solution of problems of a technical nature (e.g., the problem of Article II, paragraph 1, and Article II, paragraph 4). I believe at one time or other, when the negotiation had momentum, I sketched out for them a form of wording which would accomplish this defined objective, clearly and in a manner consistent with the style of the rest of the treaty (for references and a summary, see the last two paragraphs of A-309, of May 27). But the last Dutch word was "totally unacceptable", or words to that effect ([blank] speaking, at our March 10 farewell meeting).

So, in light of this, and the remarks made in your letters of June 23 and September 12, I don't see that we are any forrader. They have refused to accept a clean-cut, unambiguously worded formula, or one which meets the technical problems; and what they do offer seems at best pregnant with future disputes.

I add to this the observation that the time for trying to finagle around with a magic formula now seems definitely past. There's a "time and a tide"; and the more they keep on trying to pull us forward, the more we are pulling back in resistance. At this juncture, the Department will subject everything they propose to the most meticulous critical scrutiny; in any case, technical problems remain, and I do not know what solutions there are for them. If [blank] would like my opinion, then, I'd say let's abandon this endless and profitless search for a formula. To paraphrase the Veep, the thing's now a "cold biscuit" beyond a rewarming.

Let's ask: What is it, exactly, that they want? Evidently, the broad "controlled company" formula is simply a circumlocution for building up the real property article through the back-door, so to speak. This is evident not only from the negotiating history, but also on grounds of logic. The heart-provision of the treaty already provides amply for the rights of controlled companies (namely, the major provision on the business activities of companies; see Article VII, paragraph 1, clause (b) and (c) and last sentence). They appreciate this. At least, apart from the non-applicability of Article VII to real property, they have never indicated any dissatisfaction with this article in the "controlled company" context.

The next treaty provision of first importance is that on expropriation (VI-4). Here again, through a standard protocol (numbered "7", I believe, in the latest available draft), the "controlled company" is

cared for,

cared for, as is also the case with the two other protection-of-acquired-property provisions in Article VI in which the Dutch have shown a "controlled company" interest. The only one left is the property article; they've never pointed to any other provision where they feel they need "controlled company" protection. As regards the property Article (II), there is no solution in delicately avoiding pointing the finger at it; the Department is going to judge any formula by looking behind its surface to see how the article might actually be affected by it. Within the limits set by the Department's well-known and fixed position concerning this Article, there is latitude for only two accommodations. First is an assurance that "controlled companies" get as good treatment as their parents are vouchsafed. They proposed this long ago, and we accepted the proposal; but since then they changed their minds about it. I guess the offer is still open, if they want to come back to it. Secondly, they have been concerned lest at some future date our policy might be liberalized in a treaty with some other country; and they would want to be able to pick up such liberalized rights. This is obviously a question that concerns not merely "controlled companies", but also Dutch companies proper and Dutch citizens. In mulling this over here a while ago, our legal advisers' office came up with a fresh suggestion: namely, that we could have a side letter, undertaking if the Dutch desired [Comment: handwritten word "consultations" inserted here] under Article XXV-1 (old XXIV) about the matter. The purpose, of course, would be to negotiate a Protocol with a view to bringing the Dutch treaty abreast of the other treaty in question.

A mild remark I ventured at our last meeting, in discussing the problem posed by a sweeping and indefinite formula, is worth repeating and emphasizing: namely, if there is some other paragraph or article of the treaty about which they have "controlled company" worries, they ought to identify the

same. These treaties consist of a long array of specific provisions, each dealing with a defined subject-matter in a carefully formulated way. The standards of treatment, properly applicable, and the qualifications and reservations which are deemed pertinent, can thus be varied accurately from subject to subject. This is because, in the comprehensive sweep of such an instrument as an FCN treaty, the parties need to be able to visualize with some confidence exactly what they are undertaking.

[Comment: Word "A" crossed out and handwritten words "As a" inserted] proposition becomes too broad, it gets to be unmanageable in terms of visualizing the contingencies. When this matter of providing that a controlled-company enjoys parent-company rights first arose in connection with real property, it could be confidently visualized that the principle was acceptable, because the mind could be focussed on one mensurate problem. But, then, when last March it was proposed to extend this proposition to the whole treaty, reservation became appropriate. At the time, it immediately came to mind that this would give a Dutch-controlled American company special privileges under II-4 with respect to apportionment of income not enjoyed by an American-controlled American company—a result which both sides concede to be inadmissible. Since starting this letter,

a couple

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a couple more such problems have come to mind. (1) Under Protocol 2, a person to be entitled to a visa must be an employee of a Dutch company. The Dutch-proposed protocol would give a Dutch-controlled American Company an advantage over the American-controlled American company, which

poses not only a question of discrimination but of our immigration laws and regulations (I give this merely as an illustration of a possible problem which may or may not be difficult). (2) Would the most-favored-nation feature of the broad wording serve to override the exception for double-tax conventions in Article XI(5)? This, again, would clearly be an inadmissible result. How many more such discrepancies would there be? No one can tell. Prudence and orderly treaty procedure, if nothing else, therefore makes it highly advisable that any "controlled company" adjustment be dealt with only in terms of designated provisions. [Comment: "Prudence . . . provisions" is underlined in handwriting].

The Argentine treaty problem may be recapitulated as follows. That treaty, dating from 1853, contains a broad national treatment clause, applicable to "nationals", with respect to acquisition of real property. Inasmuch as since that date established U.S. treaty policy has been limited to that reflected in Article IX-1 of the Dutch treaty, we have had to avoid accepting most-favored-nation clauses that would in effect extend the Argentine right to other countries so long as the Argentine treaty remains in force. At one stage in the discussions the Dutch tried to get for themselves this Argentine right through an M-F-N clause. What I told them was that we would not accept any M-F-N clause that in our opinion would permit them to pick up the benefits of the Argentine treaty. They said they were proposing an M-F-N as to "controlled companies" only, and that their objective would be to get this advantageous treatment only for "controlled companies". I said I believed we could entertain a "controlled-company" M-F-N clause, all right (and indeed the Department gave us telegraphic authority at the time, summer of 1954, to do so; see the citation in the Department airgram above referred to). However, we would be doing so because merely a "controlled company" M-F-N clause would not get them anything from the Argentine treaty, for the reason that in the Department's opinion that treaty applied only to natural persons, and did not give any rights to companies. When [blank] questioned whether that was a proper

interpretation of the Argentine treaty, I said we would make him a sporting proposition: namely, we would accept a "controlled-company" M-F-N clause on property, making clear in the negotiating discussion our opinion as to its inapplicability to the Argentine treaty, and that if he wanted to litigate the question after the treaty came in force we'd be willing to take our chances the courts would uphold our interpretation. It's only in this sense that the Argentine treaty provision is "available" to them.

I guess I've rambled along more than enough; but I figure it might be useful to you to draw together a story which would otherwise have to be pieced together, and then perhaps only imperfectly, from various scattered fragments in the record. I guess I wouldn't particularly

mind if

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[End of page]

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mind if [blank] saw this letter privately, except as it might contain something unintentionally susceptible of giving umbrage and that you can probably better tell him orally whatever ought to be said. Please remember me kindly to him when next you meet.

Sincerely,

Trade Agreements and
Treaties Division

ITR:TAD:
9/16/55

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Exhibit 14

[LETTERHEAD OF THE FOREIGN SERVICE OF THE UNITED STATES OF AMERICA]

[SEAL]

OFFICIAL USE ONLY

OFFICIAL-INFORMAL

AMERICAN EMBASSY
The Hague, Netherlands, September 28, 1955

Dear

I have just had a long discussion with [blank] during which I revealed the substance of your letter of September 16, 1955 using your colorful words to convey part of it. However, I did not let him read the letter. Indeed, it was unnecessary to reveal all of your letter because [blank] assured me that they are not seeking to obtain through a "magic formula" what they were unable to get during the earlier negotiations. He said that the reason for his more general wording in the draft Protocol was merely to insure that Dutch controlled companies will be assured of a) the treatment given to parent companies and b) most-favored-nation treatment. Indeed, he said that the points "a", "b" and "c" made in the first paragraph, page 2 of your letter are in fact what they are seeking. However, I understood from our earlier conversation that they were also seeking national treatment as reported in my letter dated September 12. I do not doubt the sincerity or accuracy of his present statement of intent. We should take it at face value.

He indicated also that they would like to get something along the lines of the Argentine Treaty provision; hence paragraph 4 of your letter was particularly helpful. I read the first half of the pertinent paragraph to him.

[blank] at first suggested that we prepare a new proposed wording but I turned back the request suggesting that he take another look at the so-called American Draft. At the same time I emphasized that if they still insist on a protocol to cover this point, it should be unambiguous and directly pointed to the two points which they wish to cover; namely, parent company and m-f-n treatment.

[blank] tells me that he has started the translations. Today he gave me "Clean" copies of the Treaty dated September 1955, FOTO-Btz. 90986. A copy is enclosed herewith for your information. No Clean Drafts were given for the Protocol and enclosed letters. Four copies of the Clean Draft Treaty are being transmitted to the Department under cover of a despatch.

Cordially yours,

[name blank]
Counselor of Embassy
for Economic Affairs

Enclosure:
As indicated above.

Esquire,
Commercial Policy Staff,
Room 600—SA-7,
Department of State,
Washington 25, D.C.

Exhibit 15

[Comment: Illegible handwriting upper right hand corner of page]

OFFICIAL USE ONLY

OFFICIAL-INFORMAL October 28, 1955

Dear

As promised in my hurried note of yesterday regarding the possibility of a look in at The Hague by [blank], Assistant Legal Adviser for Economic Affairs, there is enclosed a copy of Beelaerts' letter of October 22 for your file and use. The red pencil marks are as in the original.

I think I appreciate, and have appreciated, the intended purpose and origin of [blank]' draft and would not be inclined to contest the general viewpoint set forth on his first page, if I read it aright. One thing a rewriting of someone else's formulation accomplishes is to reveal precisely whether there is a common understanding of intent and purpose; and I guess our last counterdraft helped along that process. The new facet clarified is what he had meant some while back when he told you that "controlled companies" should in general be treated as any other domestic company. What he evidently means is that he simply does not want a formulation which would seem to detract from the extent [Comment: handwritten "to" inserted] which "controlled companies" are equated to domestic companies under the treaty or under legislation—a proposition which, as stated, does not run afoul of the Department's unwillingness to extend the limits of Article II on real property. I am glad that now we have an elucidation that clears up the seeming conflict between the general proposition regarding "controlled companies" and its specific application to real property.

In my undated letter transmitting the redraft of [blank] proposal (which letter should have borne the date October 14), I made the point that, despite a superficial appearance to the contrary, the legal adviser's formulation of the proviso to be inserted in Article XXIII paragraph 3 was not calculated to detract in any way from the rights and privileges a "controlled company" would otherwise enjoy. That was the significance of my remark that the treaty is always a floor and not a ceiling. The effect of the legal adviser's

formulation

[blank], Esquire
Counselor for Economic Affairs,
American Embassy,
The Hague, Netherlands.

[End of page]

-2-

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formulation was to assure that the "controlled company" will always, as a minimum, get everything that the parent company gets as a matter of treaty right—but was not calculated to detract from any additional privileges that the "controlled company" may actually have. I took the pains of pointing this out in order to anticipate just such an objection as [blank] raised in the first page of his October 22 letter. I hope you will mention this to him, so as to allay any misapprehension he may be under as to our appreciation of the point. The Department has the same interest as he in avoiding damage to the position of "controlled companies", because Americans have "controlled companies" abroad just as the Dutch have them in U.S.

If it works out that [blank] can drop by The Hague, I see no reason why he and the Dutch should not be able to reach an amiable meeting of minds around the table on just how best to formulate and handle the matter. If it does not prove feasible, for one reason or another, for [blank] to come by, I will take

the matter up further with his office to see what else we might be able to do to meet [blank]' concern.

Now turning to the second page of [blank]' letter —the first and second paragraphs thereof—I just do not understand what ground he has for complaining at all over what we drafted there. It is very clear that his draft dealt with two subject-matters and [Comment: handwritten word "that" inserted] there was a certain overlap and duplication in it. It also seems very clear to me that clarity and avoidance of confusion dictate the separate handling of these two elements, as well as revisions which would eliminate the overlap. I just don't see how there could be any debate over such a procedure. Secondly, since the acute policy problem over Treaty provisions on property is a U.S. problem, I do not think he ought to quarrel with the Department as to the place in the Treaty where the provision relating to real property should go. There is no question that we intended to provide, and actually did provide, in our counterproposal of October 14, all of the substance of his proposal in this connection. So, I think he should amiably concede us the matter of form, about which we have to make judgments governed by U.S. domestic considerations.

As to the third paragraph on the second page of his letter, it seems possible that our redrafting touched a nerve. He seems to be protesting rather more vigorously than called for. I am relieved that it is not the Dutch intent to write into the Treaty rights for companies organized under the laws of third countries (e.g., a Dutch-controlled Argentine company). However, I quite well recall that at one time in the negotiation (July 1954) [blank] very definitely sought to have such a proposition recognized in the Treaty. For two reasons, therefore, it is my own conviction that we ought to be jolly well certain that any general formulation we put into the Treaty on "controlled companies" make this point clear on its face. (These reasons are (a) a negotiating record of a Dutch effort to include rights for "controlled companies" chartered by third countries, and (b) the desirability of making the intent of Treaty provisions clear on their face wherever possible, so as to avoid mistaken

interpretations by those who may not be familiar with the tacit understandings reached during the negotiations. Unless it is clear on its face that "controlled

companies"

OFFICIAL USE ONLY

[End of page]

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companies" of third countries are not included, I think a judge could very fairly conclude that they were.)

I cannot agree with [blank]' assertion that wherever the Treaty makes mention of "controlled companies" the language is silent as to whether companies of third countries are included. Let us take them up, one by one. Article VII, paragraph 1, in its second sentence clause (B) speaks specifically of "controlled companies" of the receiving Party, [Comment: "of the receiving Party" underlined by hand] to the exclusion of companies of third countries. Because of its position, this is the governing rule in the matter for the whole Article. We have made only one limited departure from it [Comment: handwritten word "in" inserted] deference to one of [blank] requests: namely, we have agreed to recognize that the chain of control can be "through one or more intermediaries". This concession, however, is irrelevant to the point at issue, and, if anything, it serves only to emphasize the need for our intent [Comment: handwritten words "to be" inserted] clear in any general rule on "controlled companies" we might add to the treaty. The other specific reference to "controlled companies" is in Article XVI, paragraph 2, which recites "companies of the latter Party [Comment: "the latter Party" underlined by hand] controlled by such nationals". There remains Article VI and the Protocol relating thereto. The Protocol concerns the very special matter of piercing the corporate veil for purposes of assuring compensation with regard to expropriated interests in property. It has nothing to do with the treatment accorded to "controlled companies" as such. Finally, in the last sentence of Article VI,

paragraph 5, we are not writing a rule in terms of "controlled companies" but in terms of "enterprises" in which there is a "substantial interest", for a very particular purpose having to do with the protection of vested property rights. This is no precedent whatsoever for the content and framing of a broad rule regarding the rights generally of "controlled companies", [blank]s' assertion, therefore, does not correspond with the facts.

The thing that we have "up our sleeve", to paraphrase [blank], is that we are going to be certain (I hope) that the Treaty wording correctly reflects our intentions in this regard. So, since [blank] has only the same thing up his sleeve, there should be no difference between us about having clear wording.

As to the penultimate paragraph of [blank]s' letter, there seems to be an inappropriate addition in the altered wording of the first sentence of his proposal; namely, the concluding clause reads: "than the nationals and [Comment: "nationals and" underlined by hand] companies of such other Party," whereas it should read merely "than the companies of such other Party". Nowhere in the Treaty do we propose to equate companies to nationals, but only to equate them with other companies. It would be inadmissible to do otherwise.

Sincerely yours,

[Comment: typewritten material on left side of page illegible]

Dept. of State

Trade Agreements and Treaty Division

Exhibit 16

COPY

MINISTERIE
VAN BUITENLANDSE ZAKEN
[blank]'S-GRAVENHAGE

October 22, 1955
143.143

Dear

I am afraid that either my explanation of our ideas was not clear or that our mutual friend [blank] is under a misapprehension as to the intent, purpose and origin of my draft.

We understood that the draft-treaty as it was discussed never referred to controlled companies except in some specific cases (art.6 par.5, art.7 par. 1 and 4, art.16 par.2). According to our view a [Comment: remainder of sentence underlined by hand] company constituted under the laws of either Party and controlled by nationals or companies of the other Party should be treated in the same way as a domestic company controlled by nationals and companies of the first Party. This principle has not been inserted as a general rule in the Treaty, but it appears in art.7 par.1.

Now in addition we want to make sure that American companies controlled by nationals or companies of the Netherlands will never be treated less favorably than their parent companies. Consequently, the possibility would remain that in appropriate cases these controlled companies might enjoy a better treatment than their parent companies. [Comment: first two sentences of third paragraph underlined by hand] The wording, which has been prepared in the Legal Adviser's Office is unacceptable because it does not leave this possibility open. Moreover it violates art. 23 par. 3. You will note that according to our views the Treaty does not deal with controlled companies as such except in the few specific cases mentioned above. The wording proposed by the Legal Adviser

would make the provisions of the Treaty directly applicable to them. And that is exactly the point, which we want to avoid.

We need, therefore, a phrasing in the negative that the treatment accorded to controlled companies will not be less favourable than that accorded to their parent companies, leaving open the possibility, which probably is the general situation, that they will receive a better treatment.

Mr. [blank]
I.C.A.—mission,
7, Benoordenhoutseweg,
The Hague.

Counselor for the U.S. Embassy for Economic Affairs

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[End of page]

nr.143.143

The second point we should like to state in the Treaty is that for the specific case dealt with in art.9, —namely the acquisition, ownership, use and disposition of real and personal property of all kinds—, controlled companies be assured of most-favoured-nation [Comment: "most-favoured-nation" underlined by hand] treatment and a treatment which will never be less favourable than that accorded to their parent companies. [Comment: "never be less favourable . . . companies." underlined by hand] I should like to stress again that art.9 as such does not deal with controlled companies at all. That is the reason why we prefer our clear wording proposed to you in the second sentence of our draft as it is clear and cannot give rise to any misunderstanding.

In Walker's letter mention is made of the place [Comment: "the place" underlined by hand] where these provisions ought to be inserted. I take it that you are agreeable to the principle of these provisions. Personally I think that it would be wise to

leave it in the Protocol as it deals with a matter, which is not treated in the body of the Treaty.

A last point, which I think we ought to make perfectly clear is that we never tried to have treaty-rights conferred to for instance French or Argentine companies controlled by Dutch nationals. Of course the Treaty, being a bilateral Treaty between the United States and the Kingdom of the Netherlands could deal only with either American or Dutch companies. In the whole Treaty whenever mention is made of controlled companies the term used is: "companies controlled by nationals or companies of the other Party". That is the reason why I see no good reason unless one has got something up one's sleeve to change the wording in this Protocol provision and insert the words: "as constituted under the laws of the other Party".

I hope this all is perfectly clear and that it will enable Walker to appreciate our draft at its real value. Nevertheless I should like to alter slightly the wording of the first sentence of our draft to read as follows: "It is understood that, except with respect to Article II, paragraph 4, companies of either Party controlled by nationals and companies of the other Party shall in no case receive less favourable treatment within the territories of the first Party than the nationals and companies of such other Party."

I could not agree more with Mr. [blank] that tinkering with words does not seem profitable. Hence I should appreciate it very much if my amended draft could now be accepted by your people.

Sincerely yours,

(Signed informally)
Netherlands negotiator

Exhibit 17

DEA October 6, 1955

Treaty of Friendship 135.140

Dear Mr.

With reference to our conversation about the famous protocol-provisions no 12 I think perhaps the following wording might suit our mutual ideas.

[Comment: Following paragraph has handwritten designation "1" and handwritten bracket]
"Provisions establishing treatment for companies of a Pary [sic] shall be construed as establishing treatment no less favorable for companies controlled by nationals and companies of that Party.

[Comment: Following paragraph has handwritten designation "2" and handwritten bracket]
It is further agreed that, with respect to the acquisition, ownership, use and disposition of real and personal property of all kinds, within the territories of either Party, companies of that Party which are controlled by nationals and companies of the other Party shall be accorded treatment no less favorable than that accorded within such territories to companies of such other Party or to companies controlled by nationals and companies of, any third country."

You will see that a few changes have been made but I do not think essential ones.

I do hope that this will state clearly enough our view that although to our ideas controlled companies should enjoy

national treatment they in any case will enjoy no less favorable treatment than the parent companies and on the other hand—with regard to certain specified matters—most favored nations treatment.

Sincerely yours,

M.A.
Netherlands negotiator

Mr. [blank]
Economic Counselor of the U.S. Embassy
ICA-Mission,
7, Benoordenhoutseweg,
The Hague.

Exhibit 18

[Comment: Illegible handwriting appears on upper right of page]

OFFICIAL-INFORMAL November 8, 1955

Dear

Your letter of November 4 just arrived, and stimulated another effort regarding what further [Comment: handwritten word "must" inserted] be done to allay [blank] apprehensions regarding the wording of the general rule on "controlled companies" which the Dutch wish to have in the Treaty. With advice and counsel of members of [blank] staff in the legal adviser's office [Comment: comma handwritten after word "office"] we have decided that it would be agreeable to transfer the proposal back to the protocol from the suggested position in the definitions Article which had been communicated in my undated letter of October 14. Further [Comment: comma handwritten after word "Further"] we can accept generally the further revised wording last proposed by Beelaerts in this specific connection in his letter of October 22. After omitting the words "nationals and" from the last line, as he concurs would be proper, the provision reads as follows: "It is understood that, except with respect to Article II, paragraph 4, companies of either Party controlled by nationals and companies of the other Party shall in no case receive less favorable treatment within the territories of the first Party than the companies of such other Party." I might add that some incline to feel along with [blank] that this formulation may be indeed preferable in style, appearance and structure. So you need not feel any hesitancy about informing him of our receptivity; and I hope the issue may be disposed of now without more ado.

There appears no reason, however, that we should change our counterdraft with respect to the property part of [blank]' proposal. Our opinion on this remains as given in my letter of the

14th: namely, that it should be attached to property article, in the revised form set forth. I might add, however, that if it will make him feel better about it, we could agree to the insertion of the redundant phrase "real and personal" before the word "property", provided the same change is made in the sentence already appearing in Article IX, paragraph 5, so that the format and style of the paragraph will be consistent throughout. Furthermore, the phrase "constituted under the laws" can be deleted if he finds it objectionable, in as much as it is not indispensable and had been put in merely for emphasis.

As to the

[blank] Esquire,
Counselor for Economic Affairs,
American Embassy,
The Hague, Netherlands.

[End of page]

-2-

As to the possibility of [blank] calling by The Hague to effect a final settlement about these controversial matters of form and wording, if they do not clear up in the interim.—[blank] informs me that he will not be available while the Wheat conference remains in session, but only after it is over; and I gather that he does not prefer to stay away from home any longer than necessary. The present adjournment of the conference is scheduled for November 25. Although it might possibly run a bit over this date, we should make plans as though the November 25 target date will be realized. This means that we ought to know by the 18th, by cable if necessary, if it proves desirable and expedient in your opinion for him to stop off a couple of days on his way home, so that all arrangements can be made in good time. Against the contingency, we will now inquire of the acting legal adviser whether he would be willing to spare [blank] from Washington duties for

the necessary time, in case the occasion demands. I have not anticipated that there will be objections, but of course cannot know with certainity [sic] until the permission of higher authority has been secured.

Sincerely yours,

Trade Agreements and
Treaty Division
Dept. of State

[Comment: Handwritten insertion lower left
of page as follows: "cc: L/E-.
L/T-Misc."]

Exhibit 19

[LETTERHEAD OF THE FOREIGN SERVICE OF THE UNITED STATES OF AMERICA]

[SEAL]

[Comment: Handwritten words upper right of page: "File— Netherlands"]

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OFFICIAL—INFORMAL

OFFICIAL USE ONLY

American Embassy
The Hague, Netherlands, November 4, 1955.

Dear

I was somewhat baffled by your letter of October 28 because there seemed to be no way of breaking the stalemate except by inviting one of our legal advisors to debate the wording of the most onerous portions of the Treaty. After considering all the possibilities, Andy and I decided that perhaps the best thing to do was to take your suggestion and request that Mr. [blank] come to The Hague. Nevertheless, I wanted to try once more; hence, I asked for an appointment with [blank]. I took with me quotations from your letter which I could leave with him, particularly the 2nd, 3rd, 5th, 7th and last paragraphs. I also told him of your suggestion that one way of breaking the stalemate on wording might be to get our legal advisors together. At the same time I told him we were not sure this could be arranged and would in any event involve a further delay.

[blank] readily conceded your point in the last paragraph. On the other points he reiterated the Dutch desire to have negative

wording and to cover the whole Treaty by using a protocol rather than by placing the two portions in Article IX and XXIII. I then reiterated our efforts to ascertain precisely what they were trying to get and affirmed my belief that you had earnestly sought to learn their wishes and to cover them in precise wording, no more and no less. I then asked whether there were specific objections to the proposals made in your letter of October 12 which [blank]s had not specifically mentioned in his letter of October 22. I pointed out that with respect to your suggestion that one portion be inserted in Article IX, [blank] had reacted only generally and without a specific reason, saying "That is the reason why we prefer our clear wording." He then indicated that one objection was your omission of the words "real and personal property" which had been included in his October 6th draft. At this point I deliberately demonstrated impatience. I told him that, in view of the background on this particular point, it is no small wonder that we are unable to reach agreement if

they

Herman Walker, Esquire,
Commercial Policy Staff,
Room 600—SA-7,
Department of State,
Washington 25, D.C.

[End of page]

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they don't lay all cards on the table. Accordingly, it seemed to me that the next step would be for him to write out clearly in another personal letter all of the Dutch objections to the clean-cut proposals made in your letter of October 12. I offered to transmit such a letter for your personal examination in hopes of finding a way of breaking the stalemate. I reiterated your earlier statement that there is among our people a feeling of lack of confidence as

to Dutch intentions on this particular point and unless such confidence were restored, I saw little hope of a solution.

Only [blank] were present at the meeting with me. They agreed that it might be useful to follow my suggestion of another detailed and completely frank exposition. Again my fingers are crossed but I believe that this twist might prove to be useful.

Sincerely yours,

[Signature blocked out]
Counselor of Embassy
for Economic Affairs

OFFICIAL USE ONLY

Exhibit 20

DEA November 8, 1955

Treaty of Friendship 150.664

Dear

Further to our discussions of November 4th, we reconsidered the whole problem. I think there are two questions to be answered and they correspond to the two sentences of the Protocol-provision, which I submitted to your inspection.

I understood that the general provision as we drafted it and was redrafted by the Legal Adviser in Washington to make part of article XXIII, in your opinion was not acceptable, as it would be of too broad a scope and not pinned down to a specific article. Nevertheless there seems to be no problem as to the principle; the only difficulty being the wording and the place.

[Comment: The following paragraph is underlined by hand].

Consequently nobody would deny to a company controlled by nationals or companies of one of the contracting Parties the treatment, which is accorded to the parent company, except perhaps in a very special case e.g. taxation. I think that a psychological question comes in when we try to formulate this general principle. As the principle is generally accepted I think it would be superfluous to spell it out. Therefore there seems no objection to leave out the whole matter. I think this will solve the first problem.

The other problem refers to the second sentence, which also has been redrafted by the State Department's Legal Adviser. As the wording of this provision is fairly close to what we proposed, I think we could accept that kind of language, although we should like to have inserted in this provision the general rule about the treatment not less favourable than that accorded to the parent company as referred to above. I think it makes sense to insert it here as the parent companies are specifically treated in par. 1 in art. IX.

As to the place where we should insert the provision as drafted I think an insertion in art. IX would be acceptable.

-2-

Economic Counselor U.S. Embassy

Mr. [blank]
I.C.A.—Mission,
7, Benoordenhoutseweg,
The Hague.

[End of page]

-2-
8-11-'55
150.664

Although I think that no objections will be raised in the Netherlands I must make, of course, the proviso that the whole treaty as such will have to be accepted by the Netherlands Government.

In order to make things absolutely clear I insert here the text, which according to our ideas would not meet any objections from United States' side.

Art. IX, par. 5, a second sentence: "Furthermore, with respect to the acquisition, ownership, use and disposition of property of all kinds within the territories of either Party, companies constituted under the laws of that Party, which are controlled by nationals and companies of the other Party, shall be accorded treatment no less favourable than that accorded within such territories to companies of the latter Party or to companies similarly constituted which are controlled by nationals and companies of any third country."

Sincerely yours,

M.A.
Netherlands negotiator

[Comment: Illegible handwriting appears on left side of page].

Exhibit 21

[Comment: Handwritten words "File—Netherlands" appears upper right of page].

[LETTERHEAD OF THE FOREIGN SERVICE OF THE UNITED STATES OF AMERICA]

[SEAL]

UNCLASSIFIED

OFFICIAL-INFORMAL

AMERICAN EMBASSY
The Hague, Netherlands, November 14, 1955

Dear

Your letter of November 8th crossed with one I sent to you on November 9. Undoubtedly you have seen the recent telegram which indicated that I did not relay your latest proposal concerning the wording of the "general rule" on controlled companies. [Comment: The following sentence is underlined by hand]. It seems to me that [blank] proposal relayed in his letter of the 8th to me is better, that is, of course, unless you have some objection to complete deletion. It was my impression that you would have no objection to deletion of the whole Protocol. In any event, I made quite a play at the meeting of November 4 for detailed clarification of the Dutch interests in this particular point which has caused so much trouble. In fact I was a little more than what I called "impatient" in my letter of November 4.

Regarding the [blank] letter, the Foreign Office is unable to understand why we can't find a way to accept their generous offer; however, under the circumstances they prefer to let the Protocol stand as is without a letter. In other words, they accept proposal 1 of the Department's A-317 of June 6, 1955.

Translation of the Protocol is in process. [blank]s confided privately that he is getting help on the translation from [blank] who is sending one of his American assistants this afternoon to help with the wording on the Protocol.

Your prompt replies have certainly been appreciated. In view of [blank]'s forthcoming visit to Washington, I hope you can get us an answer before the 17th as requested in the telegram. Best wishes.

Sincerely yours,

Counselor of Embassy
for Economic Affairs

[Comment: Department of State stamp appears on lower right of page along with file stamp].

[blank] Esquire,
Trade Agreements Division,
SA-7, Room 600,
Department of State,
Washington 25, D. C.

Copy of Letter From James R. Atwood, Deputy Legal Adviser, U.S. Department of State to Lutz Alexander Prager, Esq., Assistant General Counsel, Equal Employment Opportunity Commission Dated September 11, 1979

[SEAL]

DEPARTMENT OF STATE

Washington, D.C. 20520

September 11, 1979

Lutz Alexander Prager, Esq.
Assistant General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

Dear Mr. Prager:

In response to your letters of March 14 and June 21, the Department has conducted an extensive review of the negotiating files on our bilateral treaties of friendship, commerce and navigation (FCN), including the 1953 FCN with Japan, and has carefully weighed the question of coverage of subsidiaries by this treaty, an issue in *Spiess* v. *C. Itoh & Co.* (Civ. No. 75-H-267, S.D. Tex.) and two other cases more recently decided in the district court in New York (*Avigliano* v. *Sumitomo Shoji America, Inc.*, 77 Civ. 5641 (S.D.N.Y.) and *Linskey* v. *Heidelberg Eastern, Inc.*, 77 Civ. 833 (E.D.N.Y.).

The manner of coverage of subsidiaries is in many instances complex, making it necessary to rely on the intent of the negotiators to fully comprehend certain provisions. On further reflection on the scope of application of the first sentence of Paragraph 1 of Article VIII of the U.S.-Japan FCN, we have established to our satisfaction that it was not the intent of the negotiators to cover locally-incorporated subsidiaries, and that therefore U.S. subsidiaries of Japanese corporations cannot avail themselves of this provision of the treaty. In terms of

selection of personnel, management or otherwise, the rights of such subsidiaries are determined by the general provisions of Article VII (1) and (4), which respectively provide for national and most-favored-nation treatment of the activities of such subsidiaries. While we do not necessarily agree with all points expressed by the Court in deciding the *Itoh* case on the question of subsidiary coverage, we do concur in general terms with the Court's reasoning, and specifically in the result reached in interpreting the scope of the first sentence of Article VIII, paragraph 1.

Thank you for the opportunity to comment on this issue.

Sincerely yours,

/s/ JAMES R. ATWOOD

James R. Atwood
Deputy Legal Adviser

[Comment: illegible handwriting appears on right margin of letter and around signature block]

Letter of Danish Ministry of Foreign Affairs Dated October 17, 1979 and Translation Thereof Into English

Ministry of Foreign Affairs
Department for Foreign Economic Affairs
Economic Division

12, Stormgade
1470 Cophenhagen K
Phone (01) 12 28 25

A/S Det Østasiatiske Kompagni
(The East Asiatic Company Ltd.)
2, Holbergsgade
1099 Copenhagen K

17th October, 1979

Ref: ØP.1 No. 64.D.25.

Dear Sirs,

In reply to your letter of 9th October, 1979, concerning the interpretation of Articles VII and VIII of the Treaty on Friendship, Commerce and Shipping between Denmark and the United States (1951) we would inform you that an opinion has been given by the Legal Affairs Department of this Ministry. We quote below the full wording of the opinion:

> "Art. VII, paragraph 4, under which nationals and companies of either Party are permitted to engage, within the territories of the other Party; accountants and other technical experts, executive personnel, attorneys, agents and other specialized employees of their choice, regardless of nationality, has the direct aim of ensuring these companies the right to engage own citizens, i.e. foreigners in the eyes of the other Party, to fill the said posts. Accordingly, any assertion of discrimination against American citizens when these seek employment with Danish companies in

the USA is totally unfounded in the wording of the Treaty and its motives.

Further, this Ministry has been given to understand that the provision contained in Art. VII, paragraph 4, governing permission to engage personnel regardless of their nationality should be seen as a general provision which, in the absence of other stipulations, will apply to any company, controlled and managed by the citizens or companies of either Party, in the territories of the other Party, including the companies constituted in pursuance of Art. VIII. This understanding is supported by the construction of Art. VIII, which the Parties to the Treaty have voiced in the "Report on Interpretation", attached to the Treaty, and is also supported by the actual reasons behind the authorization in the same Article to control and manage a company constituted within the other Party's territories.

Otherwise, attention is directed to Art. XXIV of the Treaty, under which any dispute between the Parties as to the interpretation or application of the Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means (paragraph 2). Further, each Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other Party may make with respect to any matter affecting the operation of the Treaty (paragraph 1). This provision involves that authoritative interpretation of the provisions of the Treaty may be made only by the Parties to the Treaty, jointly, or by a third Party (e.g. court or arbitration), to whom the Parties will have agreed to submit the matter for settlement. Even though, under the transformation system ruling in the USA, the Treaty is directly applicable in the legal system of the Federation or of the individual Federal States and that, accordingly, the provisions of the Treaty may be invoked direct at the national courts, it will clearly appear from the provision of Art. XXIV that an

American court cannot authoritatively interpret the provisions of the Treaty.".

On behalf of the Minister
by authority

(signed) Lars Vissing

I the undersigned, Marie-Louise Brendstrup, Official Interpreter and Translator commissioned by the Royal Danish Ministry of Commerce, Industry and Shipping, hereby certify the foregoing to be a true and faithful translation of the original in the Danish language, produced to me this 29th day of October, 1979, at Copenhagen.

Witness my hand and official seal

[SEAL] /s/ M.-L. BRENDSTRUP

MARIE-LOUISE BRENDSTRUP /s/
sworn translator and interpreter of the English language.

THE MINISTRY OF COMMERCE
Copenhagen, [Illegible] 1979

On behalf of the Minister.
By order.

/s/ TOM LOESCH
Tom Loesch
Ass.

/s/ TOM LOESCH
[Illegible] 1979

/s/ VIBEKE EKBERGER
Vibeke Ekberger

[SEAL]

KINGDOM OF DENMARK
CITY OF COPENHAGEN SS
EMBASSY OF THE UNITED
STATES OF AMERICA

I, JEAN A. LOUIS, Vice Consul of the United States of America at Copenhagen, Denmark, duly commissioned and qualified, do hereby certify that VIBEKE EKBERGER whose true signature and official seal are, respectively, subscribed and affixed to the annexed document, was on the 30th day of October 1979, the date thereof an official at the Ministry of Foreign Affairs duly commissioned and qualified, to whose official acts faith and credit are due.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the Embassy at Copenhagen, Denmark this 31st day of October 1979

/s/ JEAN A. LOUIS
Jean A. Louis
American Vice Consul

[Original Letter]

DEPARTEMENTET FOR UDENRIGSOKØNOMI

Den ekonomisk-politiske afdeling

A/S Det Ostasiatiske Kompagni,
Holbergsgade 2,
1o99 Kbh. K.

STORMGADE 12
1470 KOBENHAVN K.
TELEFON. (01) 12 28 25

OP.1 64.D.25.

Date 17. oktober 1979.

I besvarelse af Kompagniets skrivelse af 9. oktober d.a. vedrørende fortolkning af artiklerne VII og VIII i venskabs-, handels- og søfartstraktaten mellem Danmark og De Forenede Stater (1951) kan udenrigsministeriet meddele, at en udtalelse i sagen er indhentet i ministeriets retsafdeling. Udtalelsen følger nedenfor i sin fulde ordlyd:

"Art. VII stk. 4, hvorefter det tillades hver parts statsborgere og selskaber inden for den anden parts områder efter eget valg at beskaeftige revisorer og andre tekniske sagkyndige, overordnede funktionaerer, sagførere, repraesentanter og andet personale med specialuddannelse uden hensyn til de pågaeldendes nationalitet, har direkte til formål at sikre disse selskaber retten til at ansaette egne borgere, dvs. udlaendinge set fra den anden parts side, i de omhandlede stillinger. En pastånd om diskrimination over for amerikanske borgere ved ansaettelse i danske selskaber i USA har derfor ikke noget holdepunkt i traktatens ordlyd eller dens motiver.

Det er endvidere udenrigsministeriets forståelse, at bestemmelsen i artikel VII stk. 4 om adgang til at ansaetta personale uden hensyn til de pågaeldendes nationalitet må ses som en generel bestemmelse, der, hvor andet ikke er fastsat, må gaelde

ethvert selskab, som kontrolleres og ledes af en parts statsborgere eller selskaber, på den anden parts omrade, således også de i medfør af artikel VIII oprettede selskaber. Denne opfattelse bestrykes af den forståelse of artikel VIII, som traktatparterne har givet udtryk for i det "referat vedrørende fortolkning", som er vedhaeftet traktaten, og støttes tillige af reale grunde bag befojelsen i samme artikel til at kontrollere og lede et på den anden parts omrade oprettet selskab.

Opmaerksomheden henledes i øvrigt på traktatens artikel XXIV, hvorefter enhver tvistighed mellem parterne om traktatens fortolkning og anvendelse, der ikke på tilfredsstillende made er blevet afgjort ved diplomatisk forhandling, skal indankes for Den Mellemfolkelige Domstol, med mindre parterne enes om, at afgørelsen skal traeffes ved andre fredelige midler (stk. 2). Endvidere skal hver part velvilligt overveje henvendelser, som den anden part måtte rette angående spø rgsmål om traktatens gennemførelse, og give passende lejlighed til rådslagning vedrørende såddane henvendelser (stk. 1). Denne bestemmelse indebaerer, at en autoritativ fortolkning af traktatens bestemmelser alene kan fastsaettes af traktatparterne i forening eller af en tredje part (f.eks. domstol eller voldgift), til hvem traktatparterne måtte vaere enige om at overlade afgørelsen. Selv om traktaten efter det i USA gaeldende transformerings-system er umiddelbart anvendelig i forbundsstatens eller enkeltstaternes retssystem, og traktatens bestemmelser derfor kan påberåbes direkte ved de nationale domstole, må bestemmelsen i artikel XXIV gøre det klart, at en amerikansk domstol ikke autoritativt kan fortolke traktatens bestemmelser."

P.M.V.
E.B.

/s/ [Illegible]

[SEAL]

/s/ LARS VISSING
Lars Vissing

/s/ VIBEKE EKBERGER
Vibeke Ekberger

of each of the Parties, other than Greenland, the Panama Canal Zone and the Trust Territory of the Pacific Islands.

Article XXIV.

1. Each Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other Party may make with respect to any matter affecting the operation of the present Treaty.

2. Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means.

Article XXV.

The present Treaty shall replace the convention of friendship, commerce and navigation signed April 26, 1826,[1] except Articles 8, 9, and 10 thereof, which shall remain in force until replaced by a consular convention between the two Parties or until one year after either Party shall have given to the other Party written notice of termination of the aforesaid Articles.

Article XXVI.

1. The present Treaty shall be ratified, and the ratifications thereof shall be exchanged at Washington as soon as possible.

1 TS 65; 8 Stat. 340.

[Danish translation of above, p. 935]

overhøjhed med undtagelse af Grønland, Panamakanalzouen og formynderskabsområdet Stillehavsøerne.

Artikel XXIV.

1. Hver part vil velvillig overveje henvendelser, som den anden part måtte rette ungående spørgsmål om naervaerende traktats genneinførelse, og give passende lejlighed til radslagning vedrørende sådanne henvendelser.

2. Enhver tvistighed mellem parterne om naervaerende traktats fortolkning og anvendelse, der ikke på tilfredsstillende måde er blevet afgjort ved diplomatisk forhandling, skal indankes for Den Mellemfolkelige Domstol, medmindre parterne enes om, at afgørelse skal traeffes ved andre fredelige midler.

Artikel XXV.

Naervaerende traktat traeder i stedet for den den 26. april 1826 undertegnede venskabs-, handels-og skibsfartskonvention, dog at sidstnaevntes artikler 8, 9 og 10 skal forblive i kraft, indtil de måtte blive erstattet af en konsularoverenskomst mellem de to parter, eller indtil der er forløbet eet år efter, at en af parterne ved skriftligt varsel til den anden part måtte have opsagt de pågaeldende artikler.

Artikel XXVI.

1. Naervaerende traktat skal ratificeres og ratifikationsinstrumenterne snarest mulig udveksles i Washington.

Plaintiffs' Reply to Counterclaims Dated March 6, 1980

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

77 Civ. 5641 (CHT)

LISA M. AVIGLIANO, et al.,

Plaintiffs,

—against—

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

REPLY TO COUNTERCLAIMS

Plaintiffs, by their attorneys Eisner, Levy, Steel & Bellman, P.C., for their reply to defendant's counterclaims, allege as follows:

1. Plaintiffs admit that defendant claims to invoke jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343, and the doctrine of ancillary jurisdiction, but deny that jurisdiction is properly invoked.

2. Deny paragraph 19 of the amended counterclaims.

3. Deny all of paragraph 20 of the amended counterclaims except with regard to that aspect of the paragraph that alleges that the Equal Employment Opportunity Commission violated its own rules and Sumitomo was required to spend substantial amounts of time and money responding thereto. As to these allegations, plaintiffs lack information sufficient to form a belief.

4. Plaintiffs lack information sufficient to form a belief as to paragraph 21 of the amended counterclaim.

5. Deny paragraphs 22, 23, 24, 25 and 26 of the alleged counterclaim.

6. Plaintiffs interpose no reply to paragraphs 27, 28 and 29 of the amended counterclaim as the court below ruled that they did not state a cause of action.

7. In response to paragraph 30 of the amended counterclaim, plaintiffs incorporate by reference their prior answers to the paragraphs incorporated.

8. Deny paragraphs 31, 32 and 33 of the amended counterclaim.

9. As to paragraph 34 of the amended counterclaim, plaintiffs incorporate by reference the replies to the paragraphs incorporated in this paragraph.

10. Deny paragraphs 35, 36 and 37 of the amended counterclaim.

11. As to paragraph 38 of the amended counterclaim, plaintiffs incorporate by reference the replies to the paragraphs incorporated in this paragraph.

12. Deny paragraphs 39, 40 and 41 of the amended counterclaim.

WHEREFORE, plaintiffs pray judgment as follows:

(a) That the counterclaims herein be dismissed with prejudice;

(b) That plaintiffs be awarded the costs of defending these counterclaims, including reasonable attorneys' fees; and

(c) That plaintiffs be awarded such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
March 6, 1980

EISNER, LEVY, STEEL & BELLMAN, P.C.
Attorneys for Plaintiffs
351 Broadway
New York, New York 10013
(212) 966-9620

By /s/ LEWIS M. STEEL
Lewis M. Steel

TO: CLERK
United States District Court

WENDER, MURASE & WHITE
Attorneys for Defendant

Order of the Supreme Court Granting Petition for Writ of Certiorari (No. 80-2070)

SUPREME COURT OF THE UNITED STATES

No. 80-2070

SUMITOMO SHOJI AMERICA, INC.,

Petitioner.

v.

LISA M. AVIGLIANO, et al.

ORDER ALLOWING CERTIORARI—Filed November 2, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is consolidated with case No. 81-24, *Lisa M. Avigliano, et al.* v. *Sumitomo Shoji America, Inc.*, and a total of one hour is allotted for oral argument. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

Order of the Supreme Court Granting Petition for Writ of Certiorari (No. 81-24)

SUPREME COURT OF THE UNITED STATES

No. 81-24

LISA M. AVIGLIANO, et al.,

Petitioners.

v.

SUMITOMO SHOJI AMERICA, INC.

ORDER ALLOWING CERTIORARI—Filed November 2, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is consolidated with case No. 80-2070, *Sumitomo Shoji America, Inc.*, v. *Lisa M. Avigliano, et al.*, and a total of one hour is allotted for oral argument. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

Department of State Document
Dated September 9, 1980

The Government of the United States refers to the Danish Government's note of March 17, 1980, concerning the case *Linskey* v. *Heidelberg Eastern, Inc.*, 470 F. Supp. 1191 (E.D.N.Y. 1979), *Leave to appeal denied,* Civ. 79-8475 (2d Cir. Jan. 23, 1980); and its relationship to the Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of Denmark, signed on October 1, 1951.

Issues similar to those presented in the above-mentioned note have arisen under similar provisions of United States treaties with other countries. They have been extensively considered by the Department of State and by United States courts (which must construe and apply such treaties as an element of United States domestic law). After extensive review of the matter, including study of the negotiating records of the several United States bilateral treaties of friendship, commerce and navigation containing provisions similar to Article VII(4) of the U.S.-Danish treaty, the Department of State has concluded that it was not the intent of the negotiators that Article VII of the Treaty cover locally-incorporated subsidiaries of United States and Danish corporations. To the contrary, Article XXII(3) of the Treaty specifically provides that:

> "Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party."

In this Government's opinion, Article VII is therefore inapplicable to Heidelberg Eastern, Inc. and East Asiatic Company, Inc., which are incorporated under the laws of New York. Whatever rights East Asiatic Company, Ltd., a Danish com-

pany within the meaning of Article VII, may enjoy under that Article do not extend to its subsidiaries.

Article VIII(1), which authorizes nationals and companies of one Party to constitute certain local companies in the territory of the other Party and to control and manage such enterprises, does not compel the contrary conclusion. Article VIII(2) clearly provides that companies constituted under the laws of one Party and controlled by companies of the other Party shall be entitled only to national treatment. National treatment does not entail any exemption from host country laws applicable to host country companies.

In addition, even if Article VII(4) were applicable to subsidiaries incorporated in the United States, that Article would not preclude absolutely the application of statutes barring employment discrimination. The language of that Article authorizes certain employment decisions without reference to nationality, but it does not extend to a blanket exemption from all legislation concerning discrimination in employment.

Regarding the general issue of the applicability of United States employment discrimination laws to companies (and their subsidiaries) of countries with which the United States has commercial treaties, we enclose two other recent United States court cases involving interpretation of similar provisions in the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, *Spiess* v. *C. Itoh & Co.*, 469 F.Supp. 1 (S.D. Tex., 1979), *appeal docketed,* No. 79-2382 (5th Cir. June 11 1979); and *Avigliano* v. *Sumitomo Soji* [sic] *America, Inc.*, 473 F.Supp. 506 (S.D.N.Y. 1979), *appeal docketed,* No. 80-7418 (2nd Cir. May 21, 1980). Both these cases were decided along the lines of the reasoning set forth above.

Enclosures:
As described.

Drafted: L/EB:JBello-5/8/80:L/EUR:JRCrook-6/17/80:
L/EUR:HCollums-8/29/80
Clearances: EEOC/GC:LPrager
EUR/NE:WDameron
EB/IFD/OIA:RRoberts
S/S-S:EDenham

[Comment: illegible handwriting to the right of names]

Department of State
Washington,
September 9, 1980